



**Odongo v Mars Security Guards Limited (Cause 2203 of 2017)
[2023] KEELRC 1227 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1227 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2203 OF 2017**

JK GAKERI, J

MAY 25, 2023

BETWEEN

GODFREY ODUORY ODONGO CLAIMANT

AND

MARS SECURITY GUARDS LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a Memorandum of Claim alleging unfair termination of employment, refusal to pay outstanding salary and withholding of medical reports.
2. The claimant avers that he was employed by the respondent in July 2012 at Kshs.17,000/= per month and was deployed to different stations from time to time and performed his duties honestly and obediently.
3. It is the claimant's case that on 8th April, 2017, he was bitten by a dog while on duty and upon reporting to the respondent, the supervisor was instructed to take him to hospital and was attended to and was due to report to work on 10th April, 2017 and did so and was redeployed to another station.
4. That after the dog bite, his health took a downturn and he got sick more often.
5. The claimant avers that he complained to the management about his state of health and reported to the Labour Office who directed that he be provided with medical reports in the hands of the respondent, but was sent on 4 days leave to seek treatment and present a report and was treated at the Riruta Health Centre on 28th October, 2017 and given 5 days sick-off.
6. That his efforts to be reviewed by a doctor as directed by the Clinical Officer failed owing to the high consultation fee and absence of previous records.
7. It is the claimant's case that on 2nd October, 2017, he reported to the office to hand in the sick sheet but the medical records were not provided and the September salary had not been paid and he sought



legal advise and the advocate wrote to the respondent on 29th September, 2017 (wrongly dated 13th September, 2017) and no response was forthcoming.

8. The claimant prays for;
 - i. A declaration that his dismissal by the respondent was unfair.
 - ii. An order of reinstatement.
 - iii. One (1) month's salary in lieu of notice Kshs.17,000/=
 - iv. Unpaid salary for September 2017.
 - v. 12 months compensation.
 - vi. Service pay.
 - vii. Accumulated leave days (63).
 - viii. Costs of the suit.
 - ix. Interest at court rates from date of filing.
 - x. Certificate of service.
 - xi. Any other relief the court may deem fit to grant.

Respondent's case

9. In its Memorandum of Reply dated 7th November, 2022, the respondent admits that the claimant was its employee but denies all other allegations stating that the claimant left employment on 2nd October, 2017 after he was granted 4 days sick-off to seek medical attention before which he had been invited for a disciplinary hearing which he attended with his wife as a witness but declined to respond to the accusation of absconding duty on 7th September, 2017.
10. That he was using the dog bite as a ploy to benefit while covering his misconduct yet he had received medical attention at the expense of the respondent and had resumed duty.
11. That the original medical documents were forwarded to the insurer for reimbursement of medical expenses.
12. That the claimant never returned to the workplace but served the respondent with demand letters.
13. It is the respondent's case that the claimant proceeded on leave annually from 2012 to 2017 and was paid off days and overtime and signed a discharge certificate confirming receipt of full and final dues without any further claims.
14. The respondent avers that the September salary was paid through the claimant's advocates on 25th November, 2017.
15. It is the respondent's case that the claimant made NSSF contributions.

Claimant's evidence

16. On cross-examination, the claimant confirmed that he was employed under a written contract of service but had not filed copy and had no evidence that he reported the matter to the Labour Office as alleged.



17. It was his testimony that after the dog bite, he was treated at MP Shah Hospital and vaccinated.
18. That Riruta Health Centre gave him 5 days sick off but the nature of illness was not indicated on the document.
19. That the document had no acknowledgement stamp of the respondent.
20. That the respondent told him to commence leave with no documentation.
21. The claimant denied having been asleep at work on 7th/8th September, 2017 yet he did not open the gate for the supervisor to come in until 5 a.m and had written a letter to the effect that he was in fact asleep after allegedly having taken medicine.
22. It was his testimony that he was invited for a disciplinary hearing and went there alone yet he was accompanied by his wife, one Caroline Adhiambo.
23. That he used to sign the payroll for purposes of payment of salary and used to proceed on leave but was praying for 63 days leave.
24. The claimant confirmed that the employer deducted NSSF contributions.

Respondent's evidence

25. RWI, Mr. Jackson Orondo testified that after the claimant was bitten by a dog in September and absconded duty thereafter, that he was given a show cause letter and invited for a disciplinary hearing whose proceedings were inconclusive.
26. The witness testified that after the respondent had accorded the claimant off days to seek medical attention, he did not resume duty and did not sign the payroll for the September salary which was paid to the advocate after the demand letter.
27. That the claimant did not work in October 2017 and was not paid and his employment was not terminated.
28. The witness testified that after the claimant was given 4 days sick-off, he did not return and the respondent received a letter from his lawyer on 29th September, 2019 and 11th October, 2017.
29. On cross-examination, the witness confirmed that the documents requested in 2017 were forwarded on 6th March, 2021. That the claimant's uniform, employment card were left behind when he proceeded on sick-off as a matter of procedure.
30. The witness testified that the respondent anticipated that the claimant would provide a doctor's letter on 2nd October, 2017 and he had not been away for 7 days to be declared a deserter as his was a medical case.
31. The witness testified that the respondent wrote to the Labour Officer on 16th October, 2017 attesting to the fact of desertion by the claimant.
32. That documents on record revealed that the claimant was on leave for a total of 73 days.
33. On re-examination, the witness stated that the respondent did not issue any disciplinary notice to the claimant as he had pleaded illness all along.



Claimant's submissions

34. Counsel for the claimant addressed issues of absconding of duty by the claimant, due process and reliefs.
35. On desertion, counsel submitted that the respondent failed to prove that the claimant absconded duty. Counsel submitted that the claimant had signed the Roll for September 2017 at page 16.
36. According to counsel, the claimant was hounded out of employment when he returned after sick-off.
37. On due process and fairness, counsel relied on article 41 of the *Constitution of Kenya*, 2010 and sections 41, 43 and 45 of the *Employment Act*, 2007 to urge the court that due process was not followed.
38. The sentiments of Ndolo J. in *Abisalom Ajusa Magomere v Kenya Nut Co. Ltd* (2014) eKLR were also relied upon to reinforce the submission that the respondent had failed to prove that the termination was fair and justified as it did not issue a notice to show cause and had maliciously written to the Labour Officer alleging desertion.
39. The court was invited to find that termination of the claimant's employment was unfair.
40. As regards the reliefs sought, counsel urged that the claimant was entitled to salary in lieu of notice as no notice was given, pay for days worked in September 2017, untaken leave days, compensation and service pay.

Respondent's submissions

41. Counsel for the respondent isolated two issues for determination regarding desertion of duty and the reliefs sought.
42. On desertion, counsel cited the South African court decision in *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) for the definition of desertion and the sentiments of Radido J. in *Stanley Omwoyo Onchwari v Board of Management Nakuru YMCA Secondary School* (2015) eKLR on the duties of an employer who pleads desertion by an employee.
43. Counsel urged that the respondent's evidence was clear that the claimant deserted duty from October 2, 2017 after the 4 days off given on September 27, 2017 to seek medical attention as the same was followed by demand letters from his counsels.
44. That uniform and the job card were surrendered for safe keeping on 27th September not 2nd October as alleged by the claimant.
45. That the claimant absconded duty on October 2, 2017 and had no intention of returning.
46. Counsel relied on the sentiments of the court in *Azmina Mohammed Akbar Khan v Victoria Furnitures Ltd* (2018) eKLR as well as those in *Kennedy Obala Oaga v Kenya Ports Authority* (2018) eKLR on resignation of an employee.
47. The court was persuaded to find that the claimant's employment was not terminated by the respondent.
48. On reliefs, counsel submitted that the claimant was not entitled to notice pay as he left employment voluntarily and should pay the respondent.
49. On service pay, counsel relied on section 36(6)(d) of the *Employment Act*, 2007 to urge that the claimant was a member of the NSSF and was thus not entitled to service pay.



50. The decision in *Elijah Kipkoros Tonui v Ngara Opticians t/a Bright Eyes Ltd* (2014) eKLR was relied upon to buttress the submission.
51. Counsel submitted that the claimant did not work in October 2017 and was not entitled to any pay.
52. That the claimant had taken 73 days leave compared to the 63 claimed and the final pay as evidenced by the petty cash voucher which included leave.
53. Finally, counsel urged that no compensation was due as the claimant's employment was not terminated.

Findings and determination

54. After careful consideration of the pleadings, evidence on record and submissions by counsel, the issues for determination are;
 - i. Whether the claimant's employment was unlawfully terminated or he absconded duty.
 - ii. Whether the claimant waived his right to pursue further claims against the respondent.
 - iii. Whether the claimant is entitled to the reliefs sought.
55. On the 1st issue, counsel for the parties adopted contrasting positions. While the claimant's counsel submitted that the claimant's employment was unfairly terminated, the respondent's counsel urged that the respondent's evidence was clear that he absconded duty.
56. According to the *Black's Law Dictionary* (10th Edition), desertion is;

“The wilful and unjustified abandonment of a person's duties or obligations.”
57. In the often cited South African case of *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish between absence without leave and desertion as follows;

“... 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.”
58. From the documentary evidence on record, it is evident that the claimant was injured by a dog while on duty and although the claimant alleges that it happened in April 2017, it is the respondent which adduced documentary evidence of that fact. The doctor's letter dated September 25, 2017 is clear that the injury was to the right hand only. The wound was cleaned and dressed and a tetanus jab was administered and the respondent paid the charges.
59. Documents on record also reveal that the claimant was subjected to a disciplinary hearing for absence at the place of work on 7th September, 2017.
60. In his response dated 9th September, 2017, the claimant informed the respondent that he had taken medicine that evening and became unconscious and his phone was off until 5.00 a.m when he found the supervisor at the gate.
61. From his statement, it is evident that the claimant was asleep at the work place.



62. The disciplinary proceedings were however inconclusive as the claimant raised his illness as an outstanding issue.
63. Nothing much appear to have transpired until 27th September, 2017 when the respondent gave the claimant 4 days off duty to seek medical attention.
64. The document requested the claimant to provide a report on the treatment on October 2, 2017 as he had claimed to be unwell. The note further requested the claimant to deposit his uniform for safe keeping.
65. The claimant signed the note and produced it as his evidence. He also produced a sick sheet from the Riruta Health Centre stating that he had been attended at the facility on September 28, 2017 and was found to be unfit to work and had been given 5 days sick off and expected back on October 3, 2017 for a review.
66. Intriguingly, the name of the Nursing Officer in-charge/Clinical Officer and signature are illegible.
67. Equally, the sick sheet identifies neither the complaint nor the diagnosis or the treatment administered.
68. It is unclear whether this document was presented to the respondent as it had no acknowledgement.
69. Relatedly, it is unclear whether the claimant visited the hospital on 3rd October 2017 for review as advised. He led no evidence of the visitation.
70. Instructively, the claimant did not deny having been given the 4 days off duty to seek medical attention and since the health centre gave him 5 days sick off, effective September 29, 2017, there is no evidence to show that he reported to the workplace on 2nd October as alleged.
71. On cross-examination, the claimant confirmed that he was told to commence leave and was not given a document yet he filed the complimentary slip he had signed on 27th September, 2017.
72. According to the respondent, the claimant did not report to the workplace thereafter.
73. The claimant tendered no evidence of having reported to the workplace after 27th September, 2017 or what transpired as he had already surrendered the uniform. RWI confirmed as much. The claimant was expected back on 2nd October, 2017.
74. The foregoing analysis is further reinforced by the fact that the claimant had already consulted counsel who wrote to the respondent on 29th September, 2017 and the letter makes references to the respondent's note dated 27th September, 2017 issued to the claimant.
75. The claimant's counsel forwarded another letter dated 10th October, 2017.
76. For unexplained reasons, the claimant had resolved to communicate his demands to the respondent through counsel.
77. In a similar vein, although the claimant's counsel assailed the respondent's letter to the Labour Office, the letter has an acknowledgement stamp dated 16th October, 2017. Its authenticity was unshakeable and its contents would appear to confirm the state of affairs in September 2017.
78. The court is not persuaded that the respondent dispatched the letter to the Labour Office alleging non-existent circumstances.
79. The court finds the letter credible evidence of notification to the Labour that the claimant had not reported to work for some time.



80. Noteworthy, although the claimant's counsel assailed the respondent's witness as untruthful whose testimony could not stand, the claimant's testimony fell in the same category and his credibility was also questionable.
81. For instance, he testified that he was informed by the respondent to commence leave and was not given any document yet he had been given a complimentary slip which he signed on 27th September, 2017 and produced it in court. Secondly, he testified that he attended the disciplinary hearing alone yet he was accompanied by one Caroline Adhiambo, who on cross-examination, he confirmed was his wife.
82. Similarly, the claimant testified that the Labour Officer had directed the respondent to hand over medical reports, an allegation he could not establish by evidence.
83. Finally, the allegation that he was requested to hand over work attire and Job ID on 2nd October, 2017 was untrue as the complementary slip he produced as evidence indicated he was to do so on 27th September, 2017, a fact he did not deny.
84. RWI on the other hand testified that the claimant's dog bite happened in September/October 2017 yet it happened in April 2017 as hospital records attested.
85. From the documentary evidence on record, it is discernible that the claimant did not report to the workplace after September 27, 2017 and the respondent did not dispatch a notice to show cause or dismissal letter or attempt to reach out to him as required by law.
86. In the court's view, responding to counsel's letters dated September 29, 2017 and October 11, 2017 would have demonstrated the respondent's position on the claimant and in particular the steps it was planning to take if the absence persisted.
87. RWI confirmed that he did not respond to the letters and gave no reason.
88. In determining this issue, the court is guided by the sentiments of the court in [*Felistas Acheba Ikatwa v Charles Peter Otieno*](#) (2018) eKLR,
“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
89. As adverted to elsewhere in this judgement, the court found the respondent's letter to the Labour Officer dated 16th October credible evidence of the claimant's desertion and the claimant did not adduce evidence to controvert its contents.
90. In the court's view, the totality of the evidence on record is that the respondent has demonstrated on a balance of probabilities that the claimant absconded duty.
91. This finding is further reinforced by the fact that the respondent did not issue a termination notice or notice to show cause and RWI confirmed that the claimant's employment was not terminated.
92. Similarly, the claimant's Memorandum of Claim dated 3rd November, 2017 has no date of the alleged termination of employment and the date mentioned by the claimant's statement was not substantiated by evidence as the claimant was still on a 5 days sick-off as evidenced by the sick sheet from Riruta Health Centre, which he provided as evidence of having been attended to on September 28, 2017. Equally, the claimant did not allege that he worked in October 2017 although he claimed the entire months' salary.



93. The foregoing is also consistent with the provisions of section 47(5) of the *Employment Act*, 2007 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 termination of employment or wrongful dismissal shall rest on the employer.
94. The claimant did not place sufficient material before the court for the court to make a finding that his employment with the respondent was terminated and the termination was unfair.
95. As to whether the claimant waived his right to pursue further claims against the respondent, the court proceeds as follows;
96. The principles governing discharge vouchers and/or settlement agreements are well settled by legions of decisions of the Court of Appeal.
97. Discharge vouchers or settlement agreements are contracts entered into by parties and have their justification in the principle of freedom of contract which accords parties to determine the obligations they wish to impose on themselves and can do so by word of mouth, in writing or by conduct. See *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* (2017) eKLR.
98. In *Damondar Jibabhai & Co. Ltd and another v Eustace Sisal Estate Ltd* (1967) EA 153, the Court of Appeal stated;
- “The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above-*Globe Motors Inc & others v TRW Lucas Electrical Steering Ltd & others* (*supra*), Justice Beatson stated as follows;
- Absent statutory or common law restrictions the general principle of the English law of contract is that parties to a contract are free to determine for themselves . . . whatever terms they choose to undertake . . .”
99. In *Coastal Bottlers Ltd v Kimathi Mitbika* (2018) eKLR, the Court of Appeal stated;
- “Whether or not, a settlement agreement or a 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.”
100. The court is bound by the foregoing sentiments.
101. In the instant case, the certificate of payment dated October 16, 2015 and executed by the claimant and the respondent tabulated the claimant’s entitlements regarding leave, off and public holidays including the salary for October.
102. The Certificate stated as follows;
- “I Godfrey Oduory Odongo of ID No xxx Accept the following payment from M/s Mars Security Guards Ltd of Box – xxxx-00100 Nairobi as my terminal dues, full and final settlement of my services.
- I accept the above as my full and final dues. I would like the company to pay the same and will not have any further claims against whatsoever.”



Signed Name Godfrey Oduor

103. Relatedly, the petty cash voucher on record dated 16th October, 2015 show that the claimant was paid Kshs.31,621/= and signed for the same on even date.
104. The court is further guided by the sentiments of the court in *Coastal Bottlers Ltd v Kimathi Mitbika (supra)*, as follows;

“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the Appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties . . .”
105. The court expressed similar sentiments in *Trinity Prime Investment Ltd v Leon of Kenya Insurance Co. Ltd* (2015) eKLR.
106. Guided by the foregoing elucidation of the law, the court is satisfied that in the instant suit, the parties had by the certificate of payment dated October 16, 2017 agreed that the amount therein indicated was full and final settlement of the claimant’s dues and he had no further claims against the respondent.
107. Having found as above, it is clear that the issue of whether the claimant is entitled to the reliefs sought does not arise.
108. Flowing directly from the foregoing, it is evident that the claim before the court lacks merit and it is accordingly dismissed.
109. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF MAY 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.

