



Sanghani v Ngosia (Appeal E002 of 2023) [2023] KEELRC 1234 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1234 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E002 OF 2023**

M MBARŪ, J

MAY 25, 2023

BETWEEN

R. K. SANGHANI APPELLANT

AND

PAUL NGOSIA RESPONDENT

(Being an appeal against the judgment of Hon. Nabinya the Principal Magistrate delivered on 15th December, 2022 in Mombasa CM ELRC No.1063 of 2019)

JUDGMENT

1. The background to the appeal is that the respondent filed his claim before the trial court on the grounds that he was employed by the appellant from August 8, 2015 until September 9, 2019 when his employment was terminated on account of alleged desertion of duty while earning Ksh 16,000. The respondent claimed for notice pay, work during public holidays, overtime and service pay. The respondent also claimed for a refund of unremitted NSSF dues and compensation for unfair termination of his employment.
2. In response, the appellant's case was that the respondent was earning a daily wage of Ksh 650 per day and his employment was terminated for desertion of duty without notice or following the due process and the claims made should be dismissed.
3. In his judgment, the Hon Magistrate made a finding that employment was not contested and when the appellant alleged that he deserted duty, there was nothing to demonstrate that he went looking for him or inform the labour officer and hence there was unfair termination of employment. The respondent was awarded the following dues;
 - a. Notice pay Ksh 16,000;
 - b. Leave pay Ksh 22,400;
 - c. NSSF dues Ksh 800; and



- d. Compensation at 8 months all at Ksh 128,000.
4. Aggrieved, the appellant filed this appeal on six grounds that the finding that the appellant should have informed the labour officer about the desertion of the respondent from his employment was in error. There was no evidence with regard to who terminated the respondent's employment and shifting the burden of proof to the appellant was in error.
9. Other grounds in support of the appeal are that the trial court ignored the fact that the respondent was on August 16, 2019 arrested while at work and taken to Rabai Police Station where he was charged and on August 17, 2019 he instructed his supervisor, Christopher Mwikwabe to follow up the matters at the police station where it emerged that he was released on cash bail and since, he did not report back to work or communicate with the appellant about his whereabouts. On September 2, 2019 the appellant issued the respondent with a show cause notice to explain why he had been absent from work and called him through his phone number 072278....6 but he failed to respond.

Both parties attended court and agreed to file written submissions.

10. The appellant submitted that the respondent absconded duty from August 16, 2019 after he was arrested by the police at Rabai Police Station and efforts to call him through his phone number 072278....6 were futile and which demonstrates that the appellant made effort to trace him without success as held in *Philomena Kiprotich Kirui v Lessos Veterinary Suppliers Limited* [2016] eKLR. In the case of *James Ashiambi Namayi v Menengai Oil Refineries Limited* [2016] eKLR the court held that in order to discharge the burden that the employee absconded duty, the employer must demonstrate the efforts taken to reach him without success.
11. The respondent as the employee had the burden to proof that there was unfair termination of employment in terms of Section 47(5) of the *Employment Act*, 2007 (the Act) but the trial court shifted such burden on the appellant without any lawful justification as held in *Boniface Nkubi Karaganja v Protective Custody Limited* [2019] eKLR and the appeal should be allowed the judgment of the trial court be set aside with costs.
12. In response, the respondent submitted that the trial magistrate findings were correct and the fact that he testified to the fact that on August 21, 2019 he requested for permission through a letter so as to go home to attend to an urgent matter. He was due back to work on September 4, 2019 but while he was away, the manager called him to explain why he had deserted work. At the time the respondent was in Nairobi but he was directed to report to Mombasa on September 9, 2019. The trial court evaluated the evidence and made a proper finding. There is nothing to prove that the appellant contracted the respondent as held in the case of *Boniface Francis Mwangi v BOM Iyego Secondary School* [2019] eKLR. Dismissal from employment on account of absconding duty must be with evidence by the employer as held in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR that due process before termination of employment is necessary and the appeal should be dismissed with costs.
13. In a letter dated September 2, 2019 the appellant issued notice to the respondent to show cause why he had absconded duty. The letter/notice is noted to Kokoto Yard, Mobile No 072278....6. the forwarding address to an employee who had absconded duty is not stated.
14. An employee who is absent from work without any good cause is of gross misconduct in terms of Section 44(4)(a) of the Act. However, the employer must invite the employee to make representations however short the notice.



15. Where the employee continues to be absent, notice to terminate employment must issue to the Labour Officer in terms of Section 18(5)(b) of the Act,

(5) Upon the termination of a contract of service—

(a) ...

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages *in lieu* thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.

16. The issuance of a notice to show cause is not sufficient. In this case, the notice issued to the respondent is without his address. Such an address is required in terms of Section 10 (2)(a) of the Act, which requires the employer to take down the postal address of the employee upon employment.

(2) A written contract of service shall state—

(a) the name, age, permanent address and sex of the employee;

17. These legal requirements are not only necessary for the employee but serves both parties. Where an employee is alleged to be absent from work without permissions, that address is crucial. A document cannot have issued to the respondent at his site of work where he was alleged to have absconded duty.

18. The findings by the trial court in this regard cannot be faulted. Without any effort to reach out to the employee and no notice to the Labour Officer, the conduct of the respondent with regard to alleged absence from work was not proved.

19. Section 47(5) of the Act places the burden of proving unfair termination on the employee while the burden of proving that the reasons leading to termination of employment are justified is on the employer. In Josephine M Ndungu & others v Plan International Inc [2019] eKLR, the court said this of the foregoing: -

Under section 47(5) of the Employment Act, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.

20. Overall, the employer has the duty to provide evidence to establish the validity of the termination of employment in terms of Sections 43 and 45 of the Act absent which a presumption of fact arises in favour of the unlawfulness of the termination. Section 43 and 47(5) are therefore interconnected as held in Muthaiga Country Club v Kudheiba Workers [2017] eKLR that;

The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the



alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment.

The trial court cannot be faulted on the findings in the judgment. without taking through the legal process, the appellant failed to complete the process over the alleged absence from duty.

With regard to the awards, notice pay and compensation are remedies available in a case of unfair termination of employment. compensation is at the discretion of the trial court unless this is demonstrated to be applied without regard to the law which is not the case here.

On the claim for unpaid leave, before the trial court, on February 15, 2020 the respondent testified that he proceeded on leave then he lost parents, when I asked for 14 days more. It was allowed after which he was allowed to reapply, when I refused terms were terminated.

Upon cross examination, the respondent also testified that he proceeded on leave for one year.

The award of leave, following the evidence on record is not justified.

With regard to NSSF refunds, where the employer is not compliant with the provisions of Section 35(5) and (6) of the Act, service pay is due but the unremitted statutory dues must be accounted to the statutory body and not paid to the employee. The award for NSSF is in error.

Costs of the suit is a discretionary award in terms of Section 12(4) of the Employment and Labour Relations Court Act, 2011. On good and justified grounds, the court may award costs or decline to award costs.

On the reasons above, the appeal is partially allowed the judgment delivered on December 15, 2022 in Mombasa CM ELRC No 1063 of 2019 is hereby reviewed in the following terms;

- a. Compensation Ksh 128,000;
- b. Notice pay Ksh 16,000;
- c. And each party shall bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

.....and.....

