



**ASA Limited v Wekesa & another (Cause 38 of 2016)
[2023] KEELRC 1225 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 38 OF 2016**

JK GAKERI, J

MAY 18, 2023

BETWEEN

ASA LIMITED CLAIMANT

AND

STANLEY WEKESA 1ST RESPONDENT

LISA WANGUI WACHIRA 2ND RESPONDENT

JUDGMENT

1. The Claimant initiated this Claim by a Memorandum of Claim filed on 15th January, 2016 alleging that the Respondents were its former employees engaged as Loan Officers on 31st June, 2014 and 5th January, 2015 respectively.
2. It is the Claimant's case that the Respondents absconded duty and did not give the requisite one (1) month's notice as per the letter of appointment.
3. That the Claimant conducted a review of the Respondent's portfolio and discovered massive irregularities that the 1st Respondent shared loans with clients, manipulated data to cover up stealing from clients through loan disbursements, influenced clients to pay by instalments through MPESA contrary to the Claimant's policies and solicited money from clients and did not remit collections to the Claimant's office, thus misappropriating Kshs.253,125/= less one month's notice Kshs.271,125/=.
4. That the 2nd Respondent's portfolio revealed three fake loans with an outstanding balance of Kshs.24,750/= and had misappropriated a total of Kshs.49,149/=. The 2nd Respondent had been issued with suspension letter dated 17th July, 2015 and terminated thereafter after discovery of irregularities and her salary for the month was Kshs.11,835/= and thus still owed the Claimant Kshs.37,314/=.



5. That the misappropriations were reported at the Muthaiga Police Station vide OB No. 32 and investigations were on-going.
6. The Claimant avers that the Respondents have refused or failed to pay despite demand.
7. The Claimant prays for;
 - i. Damages for breach of contract.
 - ii. Recovery of the amounts claimed as follows;
1st Respondent Kshs.271,125/=
2nd Respondent Kshs.37,314/=
Total Kshs.308,439/=
 - iii. Interest on (i) and (ii) above at court rates till payment in full.
 - iv. Costs of the claim.
8. From the Affidavit of Service dated 26th February, 2016, it is clear that the Respondents were not served as required and on 27th March, 2017, the court directed the Claimant to serve the Respondents by a public advertisement or registered post and registration certificates on record reveal that indeed service was effected by registered post namely 182 Bungoma and 460 Nyahururu.
9. Subsequently, it appears that the Claimant obtained the Respondents email addresses and served mention notices by email and registered post.
10. None of the Respondents appear to have responded to the emails or letters.

Claimant's evidence

11. CWI, the Claimant's Human Resource Manager testified that he was adequately versed with all company records on the Respondent's conduct.
12. It was his testimony that the Respondents were employed in 2014 and 2015 respectively under written contracts of service.
13. That in late 2015, the then Human Resource Manager informed the Company Director that the 1st Respondent had absconded duty and the 2nd Respondent's employment was terminated owing to irregularities and misappropriation of funds. That demands by the former manager were not honoured and the loss was eventually reported to the police.

Claimant's submissions

14. The Claimant's counsel identified two issues for determination, namely;
 - i. Whether the court has jurisdiction to determine the issues raised.
 - ii. Whether the Claimant is entitled to damages for breach of contract.
15. On the first issue, counsel relied on Article 41(1) of *the Constitution* of Kenya, 2010 that all persons are entitled to fair labour practices and that persons included the employer.
16. That Section 12 of the *Employment and Labour Relations Court Act*, 2011 gives the court jurisdiction to make the orders sought.



17. That some of the alleged issues are tortuous but since they arose from an employment relationship, the court had jurisdiction to determine the suit.
18. As regards damages for breach of contract, counsel relied on Section 12(3) of the *Employment and Labour Relations Court Act*, 2011 to urge that the court could award damages under paragraph (vi) or other appropriate relief under paragraph (viii) and could thus award general damages.
19. Counsel urged that the Claimant was entitled to one (1) month's salary in lieu of notice.
20. The decision in *Kenneth Onialo V Majlis Resort Lamu t/a Majlis Lamu Ltd (2022)* eKLR where the court underlined the right of the employer to recover pay in lieu of notice from the employee in default was relied upon to buttress the submission.
21. On desertion of duty, counsel relied on the decision in *Ronald Nyambu Daudi V Tornado Carriers Ltd (2019)* for the proposition that the employer must demonstrate the efforts made to reach out to the deserting employee and issuance of notice to show cause.
22. Counsel urged that the Respondents letter dated 13th January, 2015 posted to the 1st Respondent showed that the Claimant had made efforts to reach out to the 1st Respondent coupled with counsel's demand letter.
23. That service of court documents had been by post or texts via WhatsApp.
24. Counsel argued that since Human Recourse department dealt with recruitment, selection, training and development of employees, when the Claimant deserted duty, the department had to conduct fresh recruitment and the Respondent was thus entitled to general damages.
25. With regard to the misappropriated funds, counsel relied on Section 12 of the *Employment and Labour Relations Court Act*, 2011 to urge that the court had jurisdiction to regardless of whether the dispute arose from an action secondary to the contract of service.
26. Reliance was also made on the provisions of Section 87 of the *Employment Act* to urge that the dispute in question involved the conduct of the Respondents.
27. As regards evidence that the Respondents misappropriated funds, counsel submitted that since the Respondents were loan officers and their portfolios reports demonstrated misappropriation of funds, the Claimant had discharged the burden of proof.
28. The Respondents did not file submissions.

Findings and determination

29. The issues for determination are;
 - i. Whether the court has jurisdiction to hear and determine the suit before it.
 - ii. Whether the Claimant is entitled to the reliefs sought.
30. Before delving into the foregoing issues, it is elemental to elucidate the principles that govern undefended suits or where the Respondents opts not to participate in proceedings.
31. In *Humphrey Munyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd (2020)* eKLR, the court stated as follows;

“In the case of *Monica Kanini Mutua V Al-Arafat Shopping Centre & another (2018)* eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all



facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

32. Equally, in the words of Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR,

“This burden does not become any less on the employee simply because the employer has not defended the claim or absent at trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”

33. The foregoing sentiments apply on all fours irrespective of who the Claimant is. It could be the employer or employee and is premised on the mantra that he who alleges any fact or facts is obligated to establish its or their existence as encapsulated in the provisions of the *Evidence Act*.

34. Since the suit herein is undefended, it behoves the Claimant to establish all the facts alleged to the prescribed standard of proof which is a balance of probabilities.

35. As regards the existence of an employment relationship between the Respondents and the Claimant, the court is satisfied that there is abundant evidence to show that the Respondents were employees of the Respondent and the court so finds.

36. While the 1st Respondent was appointed by letter dated 31st May, 2014 which he signed on 3rd June, 2014, the 2nd Respondent was employed by a letter of appointment dated 5th January, 2015 and signed the same on 12th January, 2015. The appointment letters were explicit that the Respondents were employed as Loan Officers at the Lavington and Ruaka Branch respectively.

37. As to whether the court has jurisdiction to hear and determine the instant suit and as correctly submitted by counsel for the Claimant, the court derives its jurisdiction from Article 162(2)(a) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court Act*, 2011.

38. Article 162(2)(a) provides that;

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – employment and labour relations.”

39. Similarly, Section 12 of the *Employment and Labour Relations Court Act* provides that;

1. The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including –
2. An application, claim, or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employers organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

40. The foregoing provisions demonstrate unambiguously that the court has jurisdiction to hear and determine the dispute before it.



41. In addition, Section 12(3) of the Act itemizes the various orders and/or reliefs which the court has jurisdiction to make including damages in any circumstances contemplated under the Act or any written law.
42. The gravamen of the Claimant's case is that the 1st Respondent absconded duty and had misappropriated funds and thus owes the Claimant Kshs.271,125/=.
43. As regards the 2nd Respondent whose employment the Claimant terminated by letter dated 7th August, 2015, the Claimant is claiming Kshs.37,314/= being the difference between the amount allegedly misappropriated and the 2nd Respondent's dues of Kshs.11,835/=.
44. As regards the 1st Respondent who is alleged to have deserted duty, the Claimant relied on two letters dated 11th December, 2014 and another dated 13th January, 2015 to prove that it made reasonable attempts to reach out to the 1st Respondent to ascertain why he was not reporting to the work place.
45. The letter dated 11th December, 2014 indicates that the 1st Respondent had not reported on duty since 1st December, 2014 allegedly after receiving the November salary.
46. The letter catalogued the alleged irregularities and accorded the 1st Respondent 14 days to respond or risk recovery proceedings.
47. The letter was allegedly sent on 13th September, 2014, long after the 2nd letter which has no indication that it was dispatched to the 1st Respondent.
48. The only postal registration certificate on record shows that a letter or parcel was posted to the 1st Respondent on 17th January, 2020 and the 2nd Respondent on even date.
49. It is unclear to the court how the letters dated 11th December, 2014 and 13th January, 2015 were dispatched to the 1st Respondent.
50. Significantly, and correctly submitted by the Claimant's counsel, an employer who pleads desertion or absconding of duty by an employee is required to demonstrate the efforts expended to contact the employee to explain why he/she was not reporting to the work place. See *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR, *Judith Atieno Owuor V Sameer Agricultural & Livestock Ltd* (2020) eKLR).
51. In the instant case, the Claimant has, in the court's view provided evidence to show that it took steps to contact the 1st Respondent to ascertain why he was not reporting to work and the action the Claimant would take if its demand was not responded to.
52. The court is satisfied that the 1st Respondent deserted the work place from 1st December, 2014 and the Claimant is entitled to pay in lieu of notice pursuant to Clause 6(c) of the Letter of Appointment dated 31st May, 2014 which provided for termination of employment by a 30 days notice of either party.
53. As regards the 2nd Respondent, the Claimant terminated her employment by letter dated 7th August, 2015. The Claimant is claiming the amount allegedly misappropriated.
54. As to whether the Claimant is entitled to the allegedly misappropriated funds, the court proceeds as follows.
55. In its submissions, the Claimant urged that the conduct of the Respondents touched on misconduct or neglect of duty and the Claimant could thus raise the issue in court which is a legitimate claim as provided by Section 87(1) of the *Employment Act*, 2007.



56. Similarly, the Claimant argued that it incurred costs in ensuring that the 1st Respondents tasks were adequately managed in addition to conducting recruitment for the two positions and was thus entitled to damages.
57. Noteworthy, the Claimant adduced no evidence of the loss it incurred in the undisclosed recruitment or arrangements.
58. In support of the claim for damages, the Claimant filed print out from its system showing various names and pictures of persons who presumably were its employees on particular days in 2014 and 2015 as well as details relating to loan accounts.
59. Although the witness testified that the alleged misappropriation was reported to the police at the Muthaiga Station, the OB No. 32 provided is incomplete and has no date.
60. Puzzlingly, the alleged activities took place in 2014 and 2015, were reported to the police and no update was provided by the Claimant's witness yet he recorded his witness statement on 7th June, 2022, 7 years later.
61. Similarly, the printouts on record do not show the total amount allegedly misappropriated by the Respondents as the Claimant did not carry out any investigation and no attempt was made to synthesize the amounts allegedly misappropriated for presentation to court as evidence. An investigation report would have clearly demonstrated how each of the Respondents misappropriated the amounts attributed to them. It is still unclear whether the police conducted any investigation on the matter.
62. In a similar vein, the Claimant's witness, Mr. Kinyanjui Mwatha's written statement made no reference to the printouts on record nor the amount allegedly misappropriated.
63. Put in alternative terms, the witness did not testify on how, when and how much was allegedly misappropriated by the Respondents jointly or individually. Other than the printouts on record, the Claimant tendered no iota of evidence of the alleged misappropriation.
64. In determining whether the Claimant has demonstrated that the Respondents misappropriated funds, the court is guided by the provisions of the *Evidence Act* whose Section 107(1) provides that;
Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
65. Further, Section 108 of the Act provides that;
The burden of proof in a suit or proceeding lies on that person who would fails if no evidence at all were given on either side.
66. In addition, Section 109 of the Act addresses the burden of proving any particular fact.
67. In the instance case, it is common ground that the burden lay on the Claimant.
68. The court is further guided by the sentiments of Abuodha J. in *Nicholas Kipkemoi Korir V Hatari Security Guards Ltd (Supra)* on the essence of evidence to reinforce and buttress allegations made.
69. In light of the foregoing, the court is satisfied and finds that the Claimant has failed to prove on a balance of probabilities that the Respondents misappropriated funds and that it was entitled to recover the same as special damages.



70. In a similar vein, it is the finding of the court that the claim for damages for breach of contract has not been substantiated.
71. In the end, judgement is entered for the Claimant against the 1st Respondent
- i. For salary in lieu of notice.
 - ii. In light of the partial success of the Claim, the Claimant is awarded 50% of the costs.
 - iii. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH 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.

DR. JACOB GAKERI

JUDGE

