



**Musinyamwashi v China Zhongxing Construction Co Ltd (Cause
2344 of 2017) [2023] KEELRC 1167 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1167 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2344 OF 2017
AN MWAURE, J
MAY 10, 2023**

BETWEEN

HADSON MUSINYAMWASHI CLAIMANT

AND

CHINA ZHONGXING CONSTRUCTION CO LTD RESPONDENT

JUDGMENT

1. The claimant in the memorandum of claim dated the November 20, 2017 and filed on the November 23, 2017 says that he was wrongfully and unfairly terminated and declared redundant. He says he was employed as a general worker at a daily rate/ wage of ksh 220.00, which rose to ksh 280.00, ksh 310.00, ksh 330.00 and ksh 350.00 in the years 2012, 2013, 2014, 2015, 2016 and 2017.

Claimant's Case

2. The claimant avers that he carried out his duties with utmost loyalty and diligence until 29/4/2017 when he was wrongfully terminated. He was orally terminated and was never given certificate of service nor his terminal benefits. He says that when the claimant asked the Respondent's Manager why he was being terminated, he was informed that the Respondent's supervisor was travelling to China and that he would resume his duties upon his return. Nevertheless, other employees working with him continued working for the Respondent which was not a valid reason for stopping and/or terminating the claimant from his services.
3. The claimant prays for the following remedies;
 - i. A declaration that the claimant's dismissal from work on the 29/4/2017 was unlawful and unfair.
 - ii. A declaration that the said termination of the claimant by the Respondent was unlawful and wrongful.



- iii. An order compelling the Respondent to pay the claimant his terminal benefits amounting to ksh 1,038,682.00
- iv. Costs and interests of this claim.

Respondent's Case

4. The Respondent says that the claimant worked intermittently for the Respondent as a general worker on casual basis between May, 2016 and April, 2017. This is vide their response dated December 14, 2017 as per the respondent's averments. The claimant left the Respondent's employment on the April 30, 2017 of his own volition. The claimant was not underpaid as claimed and is not owed any payments for leave. It is further said that the claimant did not work on public holidays as stated.

Claimant's Evidence

5. The claimant gave sworn testimony and adopted the witness statement dated the November 20, 2017 as his Evidence in chief. He also produced documents contained in the list as his exhibits Nos 1-6. In cross examination, he said that he was not given a contract and he was a general worker. He used to work the whole week. He said that he worked till 2017 when he was terminated.
6. He further said that he never went on leave or public holidays and worked without rest. He would go on sick leave after informing the office. He further claims that he got injured at the workplace and went to hospital and was paid for the period worked. Claimant claims that he worked from 2012 in Enishipai hotel. He said that he was told there was no more work as his supervisor was travelling to China. On the overtime, he says that he used to work from 7.30 am to 5.30 pm but did not use to work on Sunday. Claimant says he was given document written in Chinese which he did not understand and he signed it.

Respondent's Evidence

7. The Respondent witness Apollo Karuri gave sworn testimony and adopted the witness statement as his evidence in chief and the list of documents dated the 27/4/2022 as exhibits in the case. He testified that the claimant worked with the Respondent from May 2016 to April 2017. He further said that the payment records do not show any payments to the claimant before 2016. The claimant was employed as a casual labourer and worked from Monday 8 am to 5pm. However if he worked past 5 pm he was entitled to overtime and documents produced show some overtime was paid. The document dated December 21, 2016 is a salary card and it shows he was overpaid ksh 500/= as overtime. On being referred to the document dated the December 21, 2016 he said it is leave days card He further stated that they do not open on Sundays. He says that in the master roll the claimant work on diverse days and like in August 2016 he was absent and also in September and October 2016.
8. In cross examination, he said that he did not indicate when he worked for the Respondent. The witness says that in 2016 the claimant went on leave for 14 days and was paid leave days. The witness further says that the claimant started working with them from 2016 and used to earn Ksh 330/= per day as salary in the year 2016 and Ksh 350/= in 2017. He says that in May 2016 to April 2017 the claimant did not work for the whole period and in 2017 the claimant did not work from May to December.
9. The witness said that the claimant absconded duty and would be warned verbally. He goes further to say that the claimant was not recalled to work formally and was not issued notice to show cause. On re-examination he said that the claimant was not given certificate as he absconded duty and there was no need to give him a termination letter.



Claimant's submissions

10. The claimant relied on the case of *Milano Electronics Limited versus Dickson Nyasi Mubaso* 2021 eKLR where the court relied on the case of *James Okeyo versus Maskant Flower Limited* 2015 eKLR for the proposition that an employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party. The Appellant was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure. The trial magistrate in my view rightly relied on the case of *Godfrey Anjere versus Unique Suppliers Limited* 2015 e KLR where the court said in cases where an employee is alleged to have deserted duty, it was necessary for the employer to show that it had taken steps to indicate to him that his employment could be terminated for unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as basis for justifying the separation.
11. The claimant therefore challenges the allegation that he deserted employment. The claimant also submits he was not a casual employee as claimed by the respondent. He says he worked continually for the respondent from 2012 till he was terminated. He also says the respondent's witness Apollo Karauri admitted the claimant worked for them from 2016-2017.
12. The claimant submits that the Respondent did not issue the claimant with NTSC and was not informed through any notice that his employment was at risk on account of his abscondment from duty from 29/4/2017.

Respondent's Submissions

13. The Respondent submits that the burden of proof that there was unfair termination of employment rests primarily on the claimant. The Respondent cites section 47 (5) of the *Employment Act* which provides 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 grounds of the termination or wrongful dismissal shall rest on the employer.
14. The Respondent relies on case ELRC Cause No 186 of 2015 Kennedy Maina Mirera versus Barclays Bank of Kenya Limited MN where the court stated that:

“The Court finds that the claimant failed to discharge the burden of proof placed on him under section 107 and 108 of the *Evidence Act*. Section 108 reads ‘the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.’”
15. In *Ronald Nyambu Daudi versus Tornado Carriers Limited* 2019 e KLR where the court held that

“Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal. The Respondent submits that the claimant has not discharged his duty of proving unlawful and or unfair termination and in the circumstances, no burden rests upon the Respondent to justify termination.”

Issues for Determination

- a. Whether the claimant was unfairly terminated.
- b. The remedies, if any, the claimant is entitled to.



16. Section 43 of the *employment Act* 2007 provides that in every legal proceeding challenging the termination of employment of an employee the employer shall be required to prove the reason for the termination and where he fails to do so the termination shall be deemed to have been unfair within the meaning of section 45 of the *Act*.
17. In *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR the court of appeal held that: -
- “There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for the termination/dismissal (section 43); prove that the reasons are valid and fair (section 45) and prove that the grounds are justified (section 47 (5)).”
18. In *Ronald Nyambu Daudi versus Tornado Ceramics Limited* 2019 Ndolo J held :
- “Desertion of duty is a grave administrative offence, 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 law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch vs Njimia Pharmaceuticals Limited* [2016] eKLR).”
19. In *Boniface Nkubu Karagamia versus Protective Custody Limited* 2019 Eklr where it is said the court held that:
- “The Claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal, the Respondent failed to produce any evidence that the Claimant deserted duty. It was only averred in the Respondent’s defence which remained mere allegations as the correspondence alluded to by the Respondent demonstrating the absence of intention to resume work was not produced in evidence. Desertion necessarily entails the employee’s intention no longer to return to work. The employer would have to establish this intention in a fair process.
20. It is uncontested that the claimant used to work for the Respondent. He led evidence that he worked for the Respondent from 2012 to 2017. There is no evidence however pointing the period he worked for the respondent. The claimant’s evidence is that he used to work continuously, and this has also not been contested. He can therefore be deemed to be a service employee within the meaning of section 37 (1) of the *Employment Act* and especially with the evidence of the respondent witness Mr Apollos Karauri who said in his witness statement that the claimant worked for the respondent from May 2016 to April 2017 and his salary was paid for the months worked. He says his leave for months worked were paid.
20. The Respondent’s says that the claimant absconded duty. There is, however, no evidence on record of attempts made to find the whereabouts of the claimant. The respondent did not write to the claimant about his abscondment and furthermore there was no notice to show cause on the desertion.



22. In the case of Ronald Nyambu daudi vs Tornado Ceramics Limited supra the court was emphatic that an allegation of desertion an employer must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.
22. The respondents have brought no such evidence that they attempted to recall the claimant if at all he deserted his employment.
22. In the circumstances the court has established that claimant was a regular employee of the respondent and must be treated in accordance to section 35 of the *employment act* 2007. The court further is persuaded the claimant was terminated from his employment without notice and without a valid reason. Respondent did not follow the procedure stipulated in section 41 of the *Employment Act*.
22. The respondent not having demonstrated credible basis for terminating the claimant from his employment therefore leads the court to declare the termination was wrongful and unfair.

Remedies

22. On the reliefs, the court taking into account the fact that the claimant cannot be said to have contributed to the termination as per evidence in court and the other factors listed under section 49 (5) awards five (5) months' salary compensation that is 5 x 12,650 = Kshs 63,250/-. This is also taking into account the period he worked for the respondent.
22. The claimant is also awarded one month salary *in lieu* of notice kshs 12,650/40.
22. The claimant raised the issue of salary underpayments in the claim, but there was no evidence raised to prove in the adopted witness statement or the evidence in court of the underpayment. The court rejects the prayer.
22. There is equally no evidence in respect of the specific days on which the overtime claimed arose and so is disallowed.
22. There was no demand made by the said claimant when he was working for the unpaid leave. The Respondent witness also led evidence in court that leave was paid and this was not challenged. The claim for unpaid leave is accordingly rejected.
22. The prayer for public holidays has no specifics and is disallowed.
22. The court will award service pay for one year as there is no evidence from the pleadings in court and the oral evidence that NSSF dues were paid. He is awarded 15 days for the one year which is not contested ksh 6,325.20
22. The total award is kshs 82,225.60 plus costs and interest at court rates from the date of judgment till full payment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF MAY, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

