



Mochere v One Way Cleaning Services Limited (Employment and Labour Relations Cause 564 of 2018) [2023] KEELRC 1924 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1924 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 564 OF 2018**

K OCHARO, J

JULY 27, 2023

BETWEEN

WILFRIDA KEROSI MOCHERE CLAIMANT

AND

ONE WAY CLEANING SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim dated April 18, 2018 seeking: -
 - a. A declaration that the Claimant's termination was unfair and unlawful.
 - b. The Claimant be paid her terminal dues and/or her salary arrears as set out in paragraph 8 hereinabove totalling Kshs 194,463.70.
 - c. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - d. The Respondent to pay costs of this claim.
 - e. Interest on the above at court rates.
 - f. The Respondent be ordered to issue the Claimant with a Certificate of Service as required by the provisions of Section 5 of the *Employment Act*, 2007.
2. The Statement of Claim, was accompanied by the Claimant's Verifying Affidavit sworn on April 18, 2018; the Claimant's Witness Statement dated April 18, 2018. and Claimant's documents under a List of Documents dated April 18, 2018.
3. In response to the Statement of Claim dated April 18, 2018, the Respondent filed a Response to Statement of Claim dated July 30, 2018.



4. The Claimant filed a Reply to Memorandum of Response dated November 29, 2018 reiterating the contents of her Statement of Claim; stating that the allegations of theft have been manufactured to sanitize the Respondent's actions; denying having received any invitation and/or warning letters from the Respondent and pointing out that she did not append her signatures to any such letters; adding that the termination of her contract of employment was premature and substantively and procedurally unfair; and confirming that she had never faced any disciplinary proceedings prior to the termination of January 25, 2023.

Claimant's case

5. The Claimant's claim is that she entered into an oral contract of employment with the Respondent, on or about October 2, 2017 as a Cleaner at its company with a starting monthly salary of Kshs 11,000/- exclusive of house allowance. During her employment with the Respondent, she was never, paid house allowance and, granted annual leave. Throughout, she was underpaid by the Respondent.
6. That the Claimant worked for the Respondent diligently and faithfully until on or about January 25, 2018, when the Respondent unlawfully and unfairly terminated her services without, reason, issuance of a notice to show cause why she should not be terminated, and or a fair hearing, contrary to section 41 of the Employment Act, 2007.
7. The Claimant avers that since her termination, the Respondent has refused and/or neglected to pay her terminal dues and/or salary arrears. Demands and notice of intention to issue to the Respondent didn't attract any positive action or any action at all from it.
8. The Claimant claims for the reliefs;
 - a. December 2017 salary Kshs 11,000.00
 - b. January 2018 salary balance Kshs 5,550.00
 - c. One month's salary in lieu of notice Kshs 11,000.00
 - d. Leave due for 4 months $21/26 \times 11,000 \times 1$ Kshs 8,884.61
 - e. Overtime worked: 8 hours for 2 days per
Week = $8 \times 2 \times 4 \times 3 \times 1.5 \times 52.88$ Kshs 15,299.44
 - f. House allowance: $15\% \times 11,000 \times 3$ months Kshs 4,950.00
 - g. 12 month's salary compensation for unlawful
Termination and loss of employment Kshs 132,000.00
 - h. Underpayments:
October: $12,926.55 - 11,000$ Kshs 1,926.55
November: $12,926.55 - 11,000$ Kshs 1,926.55
December: $12,926.55 - 11,000$ Kshs 1,926.55
Sub-total Kshs 5,779.65
 - i. Certificate of Service
Total amount due Kshs 194,463.70



9. During the hearing of the case on January 18, 2023, the Claimant adopted her Witness Statement dated April 18, 2018 as her evidence in chief and produced the documents contained in her List of Documents dated the same day as her documentary evidence.
10. In her evidence under cross-examination, the Claimant testified that the Respondent terminated her employment without issuing her with a termination letter. Mr Khaoya orally directed her to stop reporting to work. She further stated that the Respondent used to pay her salary through her account hosted at Equity Bank [K] Ltd. The Claimant further testified that contrary to the Respondent's assertion, she was never paid her salary for January 2018.
11. Testifying under re-examination by her Counsel, the Claimant reiterated that she was never issued with any termination letter, she was just told not to report to work and whenever she reported, she would not be allowed to work.
12. She contended that the allegation that she stole the Respondent's property is totally untrue. The allegation that her husband used to work for the Respondent, too. Her husband was then working for Kenya Pipeline.
13. She contended that she was working at a common area and therefore the alleged theft couldn't have been possible. The items to be used were being supplied to the cleaners by supervisors. In her work, she didn't require scrubbers.

Respondent's case

14. The Respondent presented one witness, Ms Khadija Kuria, its Managing Director, to testify on its behalf. The witness urged the Court to adopt her witness statement herein filed and dated July 30, 2018, as her evidence in-chief and the documents filed by the Respondent admitted as its documentary evidence. The Claimant didn't oppose the application. Consequently, the statement was so adopted and the documents were admitted.
15. The witness stated that the Claimant was first employed by the Respondent on the October 16, 2017. Her confirmation into employment was subject to successful completion of a probationary period of six months.
16. The witness stated that after a month, she discovered that the Claimant was a wife to the Respondent's competitor, a fact that she had not disclosed to the Respondent. Her husband had been in the employment of the Respondent, who set up a competing business while working for the it, an act which was in breach of his contract of employment.
17. The witness stated that she further discovered that the Claimant was stealing cleaning supplies from her work-station and taking them to her husband's business. Despite a warning letter dated the November 3, 2017, she continued stealing. This prompted the Respondent to issue another warning letter on the December 20, 2017. This did not stir any change in the Claimant. As a result, on the January 24, 2018, she summoned the Claimant into her office for a discussion on the theft incidents, but the Claimant failed to turn up.
18. The witness testified further that the Claimant's salary was a consolidated salary that was inclusive of house allowance. She denied the Claimant's allegation that she called her and dismissed her.
19. In her evidence under cross-examination, the witness acceded to the fact that the Respondent had no document from which the Court can discern the fact that the Claimant's salary was a consolidated salary. She contended that she didn't terminate the Claimant's employment. The Claimant was not dismissed upon the fact that her husband was running a rival business to that of the Respondent.



20. The witness testified that four months into her employment, the Claimant started exhibiting traits of indiscipline, constraining the Respondent to issue a warning against her. On the November 20, 2017, she was issued with a second warning letter, and in the letter, it was expressed that if she didn't change, the Respondent had the option of terminating her employment.
21. Referred to a letter dated November 3, 2017, signed by her, the witness stated that on it there was no acknowledgment of receipt of the same by the Claimant. She contended that the latter declined to acknowledge receipt by signing on the same. Equally, the receipt of the letter dated January 29, 2018, which spoke to the Claimant's desertion of duty was not acknowledged by the Claimant.
22. The Claimant was invited for a disciplinary hearing through the second letter that was served on her. Despite the invitation, the Claimant refused to report to the office for that purpose. She added in her testimony that usually their employees would be summoned to the office not only for disciplinary hearings but even for other deliberations.
23. The witness further testified that at her exit, the Claimant was paid all her dues. The salary for December 2017 was paid in two instalments, the 1st instalment of Kshs 5,650/- on the December 22, 2017, and the second instalment of Kshs 5,650/- on the January 4, 2018.
24. In her evidence in re-examination, the witness testified that the letters were issued to the Claimant through her immediate supervisor.

Claimant's Submissions

25. The Claimant filed submissions dated February 4, 2023.
26. She submits that having employed her via oral contract on October 2, 2017, the Respondent was obligated to comply with the provisions of Section 41 of the *Employment Act* 2007, in terminating her employment. The Respondent was also obligated to give valid reasons for her termination.
27. In the present case, the Claimant states that the Respondent did not follow the laid down statutory procedure before terminating her employment. She states that she was not subjected to any disciplinary hearing. The warning letters that the Respondent alleges to have issued to her, were never. She relies on the fact that the warning letters that were produced are not signed by her.
28. The Claimant goes on to submit that she was not given any reason for her termination and was simply chased away by the Company owner, one Khadija.
29. The Claimant cites *Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR* to support the position that the Respondent must give valid reasons for the termination and follow the statutory procedure.
30. The Claimant submits that she did not steal anything from the Respondent. She states that her husband does not run a competing cleaning business but works for Kenya Pipeline.
31. On the amounts that the Claimant is seeking, the Claimant submits that she was not issued with notice prior to her termination, and therefore ought to be granted one month's salary in lieu of notice; that the Respondent has not filed any document in Court to show that salary for January 2018 was paid, that she took leave, and that her salary included house allowance.
32. The Claimant submits that she worked 8 hours of overtime for two days per week. She also submits that she should be awarded compensation amounting to 12 months' salary for unfair termination, as well as underpaid salary as the Respondent paid her less than what was prescribed in the minimum wage order for that period, evidence which was not controverted.



33. Finally, the Claimant submits that she should be issued with a Certificate of Service.

Respondent's Submissions

34. The Respondent filed submissions dated February 15, 2023.
35. The Respondent submits that the Claimant was never issued with a termination letter, and/or her employment terminated, but absconded duty. The Respondent states that when the Claimant was found to be stealing cleaning supplies, she was issued with warning letters, which she declined to sign to confirm receipt. The matter was not escalated to the Police as the items stolen were found to be of low value.
36. The Respondent submits that the Claimant was called to come to the office, but never showed up or reported to her Makadara Station again.
37. In addition to the foregoing, the Respondent submits that per Section 47 (5) of the *Employment Act* 2007, the burden of proving unfair termination is on the Claimant, while the burden of giving the reasons for termination is on the Respondent. The Respondent states that the Claimant has not discharged her said burden by proving how the termination was effected. The Respondent also takes issue with the Claimant's failure to adduce evidence on overtime, house allowance, balance of December 2017 salary, leave pay, and underpayments.
38. The Respondent placed reliance on the Pius Macha Isindu case (Supra) to support its submission that the Claimant is not entitled to the reliefs sought of house allowance and overtime pay.

Issues for Determination

39. I have reviewed the pleadings, the witness statements, oral and documentary evidence, and the submissions filed by both parties and authorities, the following issues commend themselves for determination, thus;
- a. Whether the Respondent unfairly terminated the Claimant's employment;
 - b. Whether the Claimant should be awarded the terminal dues contained in her Statement of Claim dated April 18, 2018.
 - c. Whether the Respondent unfairly terminated the Claimant's employment
40. It is not in dispute that the Claimant was an employee of the Respondent since October 2, 2017, with parties having entered into an oral contract of employment.
41. The Respondent argues in its Response to Statement of Claim that the Claimant was on probation and had only worked for 2 months.
42. A 'probationary contract' is defined in Section 2 of the *Employment Act* No 11 of 2007 as 'a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period'.
43. It is clear to my mind that the contract between the Claimant and Respondent, being oral in nature, is excluded from being classified as a probationary contract. The Respondent's claim that the Claimant was on probation therefore fails.



44. The Claimant was categorical in her pleadings and evidence that the Respondent didn't issue her with any termination letter. She separated from the Respondent in employment when one Khadija chased her from her workplace. Her attempts to get back to work were thwarted as she was often ordered to stay away. The Respondent took a diametrically parallel position on this aspect, alleging that it didn't terminate the Claimant's employment, but the Claimant absconded duty.
45. Faced with these contradictory positions by the parties herein, this Court is enjoined to render itself on how the separation occurred before it ventures further into the issue foretasted.
46. It has not escaped the Court's sight that the Respondent's account of the event is full of contradictions. On one hand, in the Respondent's Advocates Reply to Demand dated March 27, 2018, the Respondent states that the Claimant did not complete her probationary period successfully and was therefore not confirmed. The letter read in part;
- ' Your client did not complete her probationary period successfully and was therefore not confirmed by our client. Her claim is therefore unfounded.
- Kindly advise your client that any ill-advised suit against our client will be vigorously defended.'
47. In what clearly appears to be a shift from the position of the Respondent as was expressed in the stated letter, in its response to Statement of Claim, though the probationary period is mentioned, the fact that the separation occurred as the Claimant didn't successfully complete the probationary period isn't. Instead, the issue of theft is brought up, and the Claimant being summoned to the Respondent's office for a discussion on the issue of theft but declined. The new script is reiterated in the Respondent's witness's statement.
48. From the material placed before me by the Respondent, it is not clearly brought out how the separation occurred. I have seen the Respondent's letter dated January 29, 2018, the letter brings in another aspect, abandonment of duty.
49. By reason of the premises, I am convinced that the Claimant's employment was terminated in the manner she explained, which explanation prima facie shows that the termination was unlawful. Consequently, the Court hesitates not to conclude that she discharged her legal burden under section 47[5] of the Employment Act.
50. Having found as I have hereinabove, I now turn to consider the fairness or otherwise of the termination. Invited to interrogate the fairness of termination of an employee's employment or dismissal of an employee from employment, the Court has to consider the procedural and substantive justification aspects of the termination.
51. Section 41 of the Act provides for a mandatory procedure that an employer intending to terminate an employee's employment must adhere to. The provision is crafted in mandatory terms, thus;
- 'Notification and hearing before termination on grounds of misconduct
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.'
52. As this Court has severally stated before, procedural fairness contemplated in the above-stated provision of the law is made up of three components; the notification component [the employer must notify the employee, of his or her intention to take action, and the grounds stimulating the intention]; the hearing component [the employee must be given an opportunity to make representations on the grounds, and conjoined with this is his or her right to accompaniment with a colleague or trade union representative] and; the consideration component [the employer has to consider the representations made by the employee and the accompanying colleague or union representative before taking a decision.], otherwise what would be the purpose of the hearing?
53. The Respondent was under a duty to prove the presence of adherence to the mandatory procedure contemplated in the stated provision. In my view, blurred by the position it took on the separation, the Respondent didn't place any material or sufficient material before me to illustrate the compliance. It has not lost of me that at some point in her testimony under cross-examination, the Respondent's witness asserted that the Claimant was through the letter dated December 20, 2017, invited for a disciplinary hearing. I have carefully considered the letter, to me it is just a warning letter, with no invitation content as purported.
54. Having said this, I have no doubt in my mind that the Claimant was; not notified that the Respondent intended to take disciplinary action against her on any specified grounds; not given an opportunity to prepare for her defence and make representations on any grounds of misconduct; and there wasn't any considerations made by the Respondent.
55. Section 43 of the *Employment Act* provides that an employer shall be required to prove the reason or reasons for termination of employment, failure to which the termination shall be considered unfair. The onus is therefore on the employer to prove the reason for termination.
56. In the present case, the Respondent has presented two reasons for the termination. Firstly, that the Claimant was on probation, but did not successfully complete her probation and was therefore not confirmed. Secondly, that the Claimant was found to be stealing cleaning supplies which she then handed over to her husband's competing business and absconded duty.
57. I have already dealt with the allegation that there was a probationary contract and found that the existence of the same was not proved.
58. Abandonment of employment, also referred to as desertion of employment or vacation of post, may be understood as a situation where an employee fails to attend work for an unreasonably long period of time without excuse. It is a repudiatory breach that goes to the root of the contract of employment. Imperative to state that temporary absence from work by an employee cannot be construed as desertion of employment.
59. It is trite law that before accepting the repudiation by reason of desertion of employment and terminating the contract of employment, it is required of the employer to make effort to contact the employee to find out the reason for his or her absence from work without excuse. Acceptance of the repudiation by the employer must be communicated to the employee.



60. From the material placed before me by the Respondent, there is no demonstration that the Claimant abandoned duty for an unreasonably long period without excuse, or that she did for such a number of days. Further, closely looking at the Respondent's letter dated January 29, 2018, what the Respondent terms as absconding is the failure to report to the office, which in my view cannot be equated to abandonment of employment as I have defined it hereinabove. Undeniably, there is no evidence demonstrating any effort by the Respondent to contact the Claimant if indeed there was desertion.
61. Consequently, I come to an inescapable conclusion that the Respondent totally failed to prove the reason for the termination of the Claimant's employment as was required of it by section 43 of the Act. Further, it failed to prove that there was a valid and fair reason for the termination. The termination was unfair by dint of the provisions of section 45 of the *Employment Act*.
62. For the above reasons, I hold that the termination of the Claimant's employment by the Respondent was procedurally and substantively unfair.
63. I gather support for my above finding from the case of *Walter Ogal Anuro -v- Teachers Service Commission (2013) eKLR* where the Court held that:
- ' For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.'
- Whether the Claimant should be awarded the terminal dues contained in her Statement of Claim dated April 18, 2018.
64. Having held that the Claimant was indeed unfairly terminated, I now consider the matter of the terminal dues that she is entitled to.
65. The Respondent has not opposed, or produced evidence disproving the Claimant's claim that she was not paid her salary for January 2018 and neither did she receive her notice pay per Sections 35 and 36 of the Act. I, therefore, find that the Claimant is entitled to these two payments.
66. On the balance of December 2017 salary, the Respondent has produced email correspondence dated August 1, 2018 with Equity Bank Limited, as item 6, in its List of Documents dated July 30, 2018, evidencing that the Claimant's full salary for that month was remitted to her. I, therefore, disallow this item.
67. On salary underpayment, the Claimant submits that she received a salary of Kshs 11,000/ per month from the Respondent, and claims underpayment of Kshs 1,926.55 per month for 3 months.
68. I have noted that the Regulation of Wages (General) (Amendment) Order 2017 is applicable to the Claimant's period of employment. Indeed, the Claimant was entitled to receive a minimum wage (exclusive of house allowance) of Kshs 12,926.55 as a general labourer (cleaner). Consequently, pursuant to the provisions of section 48 of the *Labour Institutions Act*, I find that the Claimant is entitled to the difference between what she was earning and that which she ought to have earned upon the basis of the Wages Order, thus Kshs 1,926.55 x 4.
69. The minimum wage salary set out hereinabove is exclusive of house allowance. Under the *Employment Act*, house allowance in situations where the employer has not provided accommodation is a statutory right. The Respondent wasn't able to demonstrate to this Court that the salary that the Claimant was earning was a consolidated amount therefore inclusive of house allowance. In the premises, this Court



is not impeded from awarding her unpaid house allowance for the time she was in the employment of the Respondent.

70. The Claimant claims housing allowance at 15% of Kshs 11,000.00 for 3 months. I award housing allowance at the rate of 15% of the basic minimum wage above, hence Kshs 1,938.98 per month, for 4 months.
71. On overtime worked, the Claimant avers that she worked 8 hours overtime for 2 days a week. The Claimant did not place evidence apart from just asserting, on the specific days when he worked overtime. In the absence of the evidence, I am inclined to decline to grant her an award under this head.
72. On leave days, there is no dispute as to the fact that the Claimant worked for 4 months for the Respondent. Under Section 10(3) of the Act, the employer is the keeper of records relating to an employee's leave. Unfortunately, the employer did not produce these records before the Court. Section 28 (1) (b) provides that when an employee has worked for two or more consecutive months, they are entitled to three-quarters days leave for every month worked. For 4 months, the Claimant is entitled to 7 days of leave, or payment in lieu thereof.
73. I now turn to the issue of compensation for unfair termination. I have found that the Claimant was unfairly terminated. Under Section 49 (1) [c] of the Act, she is entitled to compensation, up to a maximum of 12 months' gross salary. This Court's power to grant the compensation is discretionary.
74. The Claimant prays for 12 months' gross salary as compensation. The Respondent, in their submissions dated February 15, 2023, submits that no compensation should be awarded as the Claimant has not proved unfair termination.
75. This Court has carefully considered the manner in which the Claimant was terminated from employment, the casual disregard of the Respondent for fair labour practices and Sections 41 and 43 of the *Employment Act*, and the fact that the Claimant's termination of employment arose from no fault of her own and conclude that she is entitled to the compensatory relief contemplated under the provision but to an extend of four gross salary, therefore, Kshs 51,706.85.
76. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.
77. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
 - a. A declaration that the termination of the Claimant's employment was unfair and unlawful.
 - b. The Claimant be paid terminal dues as follows: -
 - i. January 2018 salary balance Kshs 5,550.00
 - ii. One month's salary in lieu of notice Kshs 12,926.55
 - iii. Leave due for 4 months $12,926.55/26 \times 7$ Kshs 3,480.23
 - iv. House allowance $15\% \times 12,926.55 \times 4$ Kshs 7,755.92
 - v. Salary Underpayments $1,926.55 \times 4$ Kshs 7,706.20
 - vi. Compensation pursuant to section 49[1][c] of the *Employment Act*, $12,926.55 \times 7$ Kshs 90,485.85
 - c. Interest on (b) above at Court rates from the date of this Judgment till full payment.
 - d. The Respondent bears the costs of this suit.



- e. The Respondent is ordered to issue the Claimant with a Certificate of Service within 30 days of this Judgment.

READ, DELIVERED AND SIGNED THIS 27th DAY OF JULY, 2023.

OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Wavinya for the Claimant

Mr. Kinara for the Respondent

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.

OCHARO KEBIRA

JUDGE

