



**Wesonga v Central Electrical Company Limited (Cause 1449 of 2017)
[2023] KEELRC 2082 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2082 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1449 OF 2017**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

TONY WANGILA WESONGA CLAIMANT

AND

CENTRAL ELECTRICAL COMPANY LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated June 29, 2017, the claimant instituted a claim against the respondent seeking the following reliefs;
 - a. A declaration that the claimant's dismissal from the respondent's service was unfair and unlawful and totally failed to follow due process.
 - b. An order for the respondent to pay the claimant his terminal dues and compensatory damages totaling Kshs. 550,800/= with interest thereon.
 - c. The respondent to pay the claimant costs of this cause plus interest thereon.
2. The Memorandum of the claim was filed together with the Claimant's witness statement and a document[s] that he intended to place reliance on as documentary evidence in support of his case.
3. Upon being served with the summons to enter appearance, The Respondent filed a Statement of Response dated 22nd October 2019, wherein it denied the Claimant's claim in toto.
4. Subsequent to the close of pleadings, the matter was heard inter-partes on 22nd June 2022.



The Claimant's case.

5. During the hearing of his case, the claimant urged the Court to adopt the contents of his witness statement as part of his evidence in Chief, and the document[s] that he filed herein were by consent admitted as exhibits.
6. The claimant testified that he was employed by the Respondent on 3rd August 2008 as an electrical Technician. On 23rd December 2016, the respondent's foreman, on authority of the supervisor declared that the respondent had no work for him, a thing which wasn't true as it had a lot of ongoing works. He stated that the foreman then declined to assign him duties and ordered him to leave the site.
7. He asserted that he was therefore dismissed. Further that the dismissal was unfair as; there was no plausible reason or explanation given to him as to why he was being dismissed; he had not misconducted himself in any manner to warrant the dismissal; the decision to terminate his employment was harsh and unjustified; and procedural fairness was ignored.
8. He contended that following the unfair and unlawful dismissal by the respondent, he has suffered immensely and to date he has not been able to secure a befitting job that would adequately enable him provide for his family.
9. Testifying on the respondent's assertion that he deserted duty the claimant denied the assertion. He stated that on the 22nd of December 2017, he was on duty as usual. On the following day he reported to work but was not assigned any work by the respondent's foreman. The foreman directed him to go have a rest as there was no work for him.
10. All the time, communication between him and the respondent was through phone. A number of the respondent's knew his place of residence, and they are still working with the respondent. The respondent neither contacted him through his phone nor sent any of his colleagues to his place of residence.
11. At the time of dismissal, he had worked for the Respondent for a period of 8 years.
12. Cross-examined by Counsel for the respondent, the claimant testified that his salary was being paid weekly. His employment was terminated on the 23rd December 2017. The termination was verbal.
13. It is the foreman who declared that there was no work for him. The claimant didn't raise this issue with the respondent's supervisor as according to him, the foreman was a representative of the respondent and his word was always final. In practice his word was that of the Supervisor.
14. He would not really understand why the respondent decided to write a letter to the labour officer, yet was them who directed him not to report to work.
15. In his evidence under re-examination, the claimant testified that the foreman was his immediate supervisor and he was obliged to follow his instructions. The workers didn't have a direct link with the directors of the respondent company, the foreman and the supervisor were the only people who had. They were they link between the workers and the directors.
16. The respondent didn't give him the letter that was done to the Labour Officer. The officer didn't call him over the letter or at all.
17. For the entire 8 years he worked for the respondent, he dutifully discharged his duties, working from Monday to Saturday. He wouldn't have a reason to abscond duty.



The Respondent's case

18. The Respondent presented Mr. Scaver Makulomba to testify on its behalf. The witness adopted the contents of his witness statement filed herein as part of his evidence in chief. At the hearing, he highlighted the statement, clarifying on areas therein that required to be.
19. The witness testified that the claimant worked as a helper[technician] at the respondent's Athi River [EPZA] site until 22nd December 2016 when he deserted work. That the claimant neither explained to the supervisor his reasons for deserting work, nor asked for permission to take leave for that period of time.
20. The witness further stated that after a while, the respondent was concerned about the claimant's whereabouts and decided to write to the County labour office vide a letter dated 24th January 2017 explaining that the claimant had gone missing from work for over a long period of time and that his whereabouts were unknown.
21. The witness testified that no termination letter was issued to the claimant because there was no reason why he should be terminated given the fact that he was a helper who was frequently needed at the site.
22. The witness asserted that efforts to trace the claimant's whereabouts realized no fruit. The site foreman tried to raise him without success. A colleague was sent to his residence but didn't get him.
23. After writing to the Labour Officer, it became duty upon him to trace the Claimant. After deserting duty, he never got back to the respondent's offices to pick his terminal dues or for any other reason.
24. Cross-examined by Counsel for the claimant, the witness stated that his position was that of Operations manager. The Respondent's sites were managed by the project manager. The site foreman was charged with the responsibility of giving instructions to site workers. The workers were under duty to abide by the instructions of the foreman. The project manager and the foreman could interact with the respondent's employees on a daily basis.
25. The witness testified that for the eight years the claimant worked for the respondent he didn't have a single disciplinary incident.
26. To establish whether or not an employee was reporting for duty, the respondent would place reliance on the information given by the foreman. As regards this matter herein, the respondent has not exhibited any list to demonstrate that on the material day[s], the claimant was absent from duty. That the claimant absconded duty, he relied on the report that he received.
27. He asserted that he called claimant but could not reach him. However, he could not tell the exact date when he did call him. The respondent didn't issue him with any shoe cause letter by having it delivered to his place of residence or calling him to pick it from its offices. The letter that was sent to the labour office was not copied to him. It did not on it bear his address or phone number, to enable the Officer reach out to him.
28. The witness further stated that he was not aware that it is the foreman, Cyrus who stopped the claimant from continuing to render his services.
29. The witness stated that the respondent's employees at the site could receive their pay slips through the project manager. Payment of their salaries was normally done through vouchers. The employees could sign the vouchers acknowledging receipt of the salary, and leave the vouchers with the respondent.



30. In his evidence under re-examination the witness stated that there is no dispute that the claimant was at all material times an employee of the respondent. The mode of payment of his salary isn't in dispute either.
31. The respondent didn't issue any termination letter to the claimant.

The Claimant's Submissions

32. In his submissions the claimant heavily reiterated the factual matters of his case as raised in his pleadings and evidence. According to him, he was summarily dismissed without any fair and valid cause. The allegation that he deserted duty was an untrue reason to cover up the unfair dismissal. The letter to the labour office was only meant to sanitize the unfair and unlawful dismissal.

The Respondent's Submissions

33. The respondent identified two issues for determination thus; whether the claimant's employment was unlawfully terminated; and whether the claimant is entitled to the prayers sought. It was submitted that by dint of the provisions of section 47[5] of the *Employment Act*, the claimant was under a duty to prove that his employment was unlawfully and unfairly terminated. He didn't discharge this burden.
34. The respondent submitted that it was able to demonstrate that the claimant deserted duty and that its efforts to trace him did not bear any fruit. Its letter to the Labour Officer dated 23rd January 2023 is a clear demonstration of this.
35. Desertion of duty amounts to misconduct under section 44 of the *Employment Act* and can be a valid ground for summary dismissal of an employee from his or her employment. To buttress this submission reliance was placed on the case of Ann Njoroge versus Topez Petroleum Limited Cause No. 1248 of 2012.
36. It further submitted that the claimant is not entitled to the reliefs sought for failed in toto to prove that the termination of his employment was unfair and or unlawful. Further, the claimant cannot be entitled to notice pay since he is the one who absconded duty. The relief sought of untaken leave is in nature a special damage which must be specifically proved. The Claimant failed to tender evidence to establish that indeed he never took any leave during his tenure with the respondent.
37. The Respondent submitted further that the Claimant is not entitled to service pay since the Respondent was remitting NSSF deductions. He is not entitled to an award of house allowance too.
38. In conclusion, the respondent submitted that the claimant's claim is a ploy for unjust enrichment and therefore prayed for the suit to be dismissed with costs.

Analysis and Determination

39. From the material placed before this Court by the parties, the following issues present themselves for determination, thus;
 - a. How did the separation in employment between the claimant and the Respondent occur?
 - b. Whether the claimant is entitled to the reliefs sought.



How did the separation occur?

40. The fact that the Claimant was at all material times an employee of the respondent whose employment came to an end on or about the 23rd December 2016, is an undisputed one. However, as regards how the former's employment was terminated, the rivals herein have taken positions that are too parallel and wide apart. This definitely impels this court to take a heightened caution. The claimant contends that the respondent terminated his employment unfairly, while the respondent contends that the separation was a product of the claimant's own making, he deserted duty.
41. Even with the diametrically opposite positions taken by the parties herein, this matter must be looked at employing the lens provided by the provisions of sections 41, 43, 45, and 47[5], of the Employment Act. Section 47[5] of the Act places burdens of proof on both the employer and the employee. The section provides;
- “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.”
- In practice this provision hasn't been without controversy, its scope and import have been confusing to both litigants and counsel.
42. In my view, the provision doesn't usher in a departure from the traditional burden of proof as known the rules of evidence. The provision calls on the employee to prima facie demonstrate that an unfair termination or wrongful dismissal of employment occurred, and it is upon so demonstrating that there occurs a shift of the evidential burden to the employer to justify the grounds for termination or wrongful dismissal.
43. I have carefully analyzed the evidence of the claimant, and conclude that prima facie the claimant did establish that an unfair termination occurred.
44. Section 43 of the Employment Act places a legal burden on the employer to prove the reason[s] for the termination of his or her employee's employment whenever the termination is in dispute. The Act places a further duty upon the employer to prove that the reason[s] was valid and fair.
45. As indicated hereinabove, the respondent asserted the claimant abandoned duty on the 23rd December 2023, and thereafter never got back to the respondent's site for work or any other reason at all. That the alleged desertion truly existed, is what the respondent was expected to demonstrate under section 43 of the Act, to the requisite standard.
46. From The evidence of both respondent's witness and the claimant undoubtedly one pivotal fact emerges, at the respondent's site where the claimant was working, his immediate supervisor was the foreman, one Cyrus. The foreman and the project manager were in charge of the day-to-day matters of the site. The witness who testified on behalf of the respondent was an operations Manager who didn't have any direct connection with the respondent's employees at the site.
47. Best evidence as regards the alleged desertion, in my view, could only be availed by the foreman, or the project manager at most, in the circumstances of this matter. None of the two was availed by the respondent to testify on the issue. The respondent didn't put forth any reason why they were, or any of them was, not availed to testify. The evidence that the respondent's witness gave and more specifically on the alleged desertion was hearsay.



48. The respondent's witness expended considerable effort, attempting, on the basis of the letter that the respondent allegedly wrote to the Labour Officer on the 23rd January 2017, to convince the Court the claimant deserted duty. With great respect, the effort did not achieve the intended purpose. As admitted by the respondent's witness, the letter was not copied to the claimant, it didn't bear either his postal address or phone number. It didn't possess a statement to the officer that efforts to trace the claimant didn't come to fruition. One would then wonder what the letter was intended to achieve and whether indeed the letter was genuine.
49. I can say without doubt that in order for an employer alleging that he or she terminated his or her employee's employment on account of desertion, to successfully discharge the burden under section 45[2] of the Act, [proving that the reason, desertion was valid and fair], he or she must demonstrate satisfactorily that efforts were made to trace the employee to inquire the reason[s] of his absence from duty and bring it to his attention that continued unauthorized absence from duty would attract disciplinary action against him.
50. The witness who testified for the respondent alleged that efforts were made to contact the claimant but unsuccessfully. Keenly looking at his evidence on this aspect one cannot help but conclude that the same was contradictory and unreliable. At some point, he stated that the foreman tried to call the claimant but could not reach him, while at another during cross-examination he stated it was him who attempted to call.
51. By reason of the premises, this Court comes to an inescapable conclusion that the respondent failed on two fronts, first to demonstrate that indeed the reason, desertion of duty truly and genuinely existed, and second that efforts were made to trace the claimant.
52. In the circumstances of this matter, it isn't difficult to agree with the claimant that procedural fairness was absent in the decision for his dismissal.
53. In the premises, I find that the separation in employment between the claimant and the respondent occurred in the manner the claimant explained to the court and not as a result of desertion as alleged by the respondent. Further, the termination of the claimant's employment was both procedurally and substantively unfair.

Whether the Claimant is entitled to the reliefs sought.

54. The claimant sought inter alia, one month's salary in lieu of notice. No doubt, the claimant's employment was terminable by twenty-eight days' notice under the provisions of section 35 of the *Employment Act*, 2007. No termination notice was given by the respondent to the claimant. He is no doubt entitled to notice pay under section 36 of the Act, Kshs. 13,500/-.
55. The claimant pleaded and testified that throughout his tenure with the respondent, he was not allowed to proceed with his annual leave, hence his claim for untaken/unpaid leave. In answer to this claim, the respondent denied that he was entitled to this relief. The Court notes that the respondent does not allege that the claimant ever utilized his leave days. The respondent didn't place any documentary evidence before this Court to demonstrate that contrary to the assertion by the claimant, he often and exhaustively utilized his leave days. In my view, therefore, the respondent's denial is just but a mere denial.
56. The Court notes that the Claimant seeks compensation for the unpaid leave for the period, of eight years. Obviously, this claim is afflicted by ignorance of the provisions of section 90 of the *Employment Act*, 2007 which provides for limitation of actions, the limitation period being three years. Having the statutory limitation period in mind, I can only grant compensation for the period, of three years



immediately before the filing of this suit. In the circumstances of the case, that is considering that the suit was filed on or about 29th June 2017, the compensation can only be computed using the period June 2014 - December 2016. Consequently, under this head, the claimant is awarded KShs. 23,625/-.

57. The claimant further sought what he termed “unpaid house allowance”, to the tune of KShs. 202,500/-. I find considerable difficulty in understanding what informed this prayer. The claimant led no evidence to establish his entitlement to this relief. Consequently, the relief is for declining, and I hereby decline to award him the sum sought or any part thereof.
58. Under the provisions of section 35 [5] of the *Employment Act*, an employee whose employment has been terminated is entitled to service pay for the years worked. Imperative to state that this provision of the law doesn’t provide for the number of days to be applied in the computation of the service pay unlike section 40 of the Act, which provides for a specific manner of computation of an employee’s severance pay. Where the contract of service doesn’t provide for the formula, Courts have often applied the computational formula provided for under section 40, fifteen [15] days for every year worked.
59. The Court agrees with counsel for the respondent that service pay is not a benefit enjoyed by every employee at the termination of his or her employment. The limitation to enjoyment is imposed by section 35[5] of the Act. Where an employee is a member of the schemes identified thereunder, including the National Social Security Fund, such an employee is not eligible legally to service pay. The respondent’s Counsel submitted that the respondent was making remittances of the claimant’s contributions to NSSF, hence he is not entitled to service pay. This submission in my view does not draw from any evidence on record. I reject the same.
60. Consequently, I grant the claimant service pay of Kshs. 54,000/- for the eight years.
61. Lastly, the claimant asked the Court to grant him compensation for unfair termination in the sum of Kshs. 162,000/-, being twelve months’ gross salary. Section 49 of the *Employment Act* provides for various remedies that can be availed to an employee termination of whose employment, has been found to be unfair or whose dismissal has been adjudged wrongful. A compensatory relief is one of them.
62. An award of the compensatory relief contemplated under section 49[1][c] of the Act, is discretionary. Circumstances peculiar to each case, influence the award and the extent thereof. I have carefully considered the manner in which the respondent terminated the claimant’s employment, the length of time that he rendered services to the respondent, and that he didn’t contribute to the termination in any manner, and conclude that compensation pursuant to the section is deserved and to the extent of ten [10] months’ gross salary, Kshs.135,000/-.
63. In the upshot, I enter judgment in favour of the claimant in the following terms;
 - I. A declaration that the termination of the claimant’s employment was unfair.
 - II. Payment in lieu of notice, one month’s salary...Kshs. 13,500.
 - III. Compensation for unused leave days,.....KShs. 23,625.
 - IV. Service Pay,..... Kshs. 54,000.
 - V. Compensation pursuant to section 49[1][c].....KShs. 135,000.
 - VI. Interest at court rates on the sum above from the date of this judgment till full payment.
 - VII. Costs of this suit.



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

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OCHARO KEBIRA

JUDGE.

