



**Otieno v Inter Security Services Ltd (Cause 660 of 2016)
[2023] KEELRC 1794 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1794 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 660 OF 2016**

JK GAKERI, J

JULY 25, 2023

BETWEEN

JOHNSON ORINA OTIENO CLAIMANT

AND

INTER SECURITY SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim alleging failure by the Respondent to pay terminal dues. He alleges that he was employed by the Respondent as Security guard on 23rd January, 2008 at Kshs.8,800/= until 1st November, 2015 when his employment was unlawfully terminated by the Respondent.
2. That he served the Respondent with loyalty and diligence.
3. That the Respondent did not give him leave for 7 years, house allowance and was underpaid for 7 years and did not remit NSSF deductions.
4. The Claimant prays for;
 - a. The sum of Kshs.455,473.00 comprising;
 - i. One month's salary in lieu of notice Kshs.12,221/=
 - ii. Annual leave Kshs.67,011/=
 - iii. Salary arrears for October 2015 Kshs.12,221/=
 - iv. House allowance Kshs.172,316/=
 - v. NSSF deductions Kshs.4,000/=
 - vi. Underpayment 2014 – 2015 Kshs.41,052/=



- vii. Compensation Kshs.146,652/=
- Total Kshs.455,473.00
- b. Costs of this suit.
- c. Interest on (a) and (b) above.
- d. Certificate of service.
- e. Any other relief as the court may deem just.

Respondent's case

- 5. By its Reply to the Memorandum of Claim filed on 25th August, 2016, the Respondent admitted that the Claimant was its employee from 23rd January, 2008 as a Security guard on temporary terms but deny that his salary was Kshs.8,800/= as alleged.
- 6. It is the Respondent's case that the Claimant's employment was terminated for gross misconduct after he failed to report to work on 8th November, 2015.
- 7. It avers that the reasons for terminating the Claimant's employment are valid as they relate to performance of his duties.
- 8. The Respondent prays for dismissal of the suit.

Claimant's evidence

- 9. In his written and oral testimony on court, CWI the Claimant admitted that he was found reading a newspaper while at his work station and was dismissed from employment.
- 10. On cross-examination, the Claimant testified that he was not issued with a warning letter in October 2016.
- 11. It was his testimony that NSSF and NHIF deductions were paid by the Respondent.
- 12. He denied having been dismissed for misconduct.
- 13. He denied that he was reading a newspaper at his work station.
- 14. He testified that he went to see the Managing Director of the Respondent but was prevented from doing so.
- 15. He admitted that his salary was Kshs.8,800/= after deductions and was paid monthly.
- 16. CWII, Mr. Jason Bosire merely stated that he was the Claimant's referee when he sought employment with the Respondent.

Respondent's evidence

- 17. RWI, Mr. Wycliffe Awina on cross-examination confirmed that he was the Respondent's Operations Controller and was an employee of the Respondent in 2008 and his role was to allocate duties.
- 18. The witness confirmed that the Claimant worked consistently and the Respondent had no Human Resource Department then.
- 19. He testified that he was not involved in the Claimant's disciplinary proceedings and he did not present himself for a hearing to be conducted.



20. The witness testified that the Claimant absconded duty on 16th November, 2015 and was declared a deserter.
21. That he was called on 8th November, 2015 and 17th November, 2015 but no letter was written to him on the alleged desertion.
22. He confirmed that the Claimant came to the office on 8th November, 2015 claiming that he wanted to speak to the Director and was due to report that evening but did not and was declared a deserter on 16th November, 2015 as he did not respond to the call made to him.
23. RWI testified that the Claimant was a casual worker.
24. The witness confirmed that the Claimant entered into a written contract with the Respondent and produced a copy of the employment contract dated 23rd January, 2008. He also confirmed that the Respondent was paying NSSF dues.
25. It was his testimony that the desertion letter was not served on the Claimant but was filed for records as the Respondent had no postal address of the Claimant.
26. On re-examination, the witness testified that after the warning letter had been issued, the Respondent organized a disciplinary committee but no hearing took place as the Claimant did not avail himself.
27. That the Claimant had not complained of underpayment.
28. That he called the Claimant on 8th November, 2016 but his response was non-committal.
29. RWII, Mr. Isaac Okwiny confirmed on cross-examination that the Claimant left on 8th November, 2015 and no disciplinary proceedings took place.
30. That the office tried to reach out to the Claimant but he was unavailable. However, the witness had no record of the calls.
31. That no letter was sent to the Claimant and the desertion letter had no date and no notice of termination was given to the Claimant.
32. The witness confirmed that the Claimant worked on a full-time basis.
33. On re-examination, the witness testified that the Claimant absconded duty on 8th November, 2015. He denied that the Claimant was underpaid.

Claimant's submissions

34. On whether the Claimant deserted duty or was unfairly terminated from employment, counsel rehashed the facts of the case and relied on the provisions of Section 35(1) of the *Employment Act* to urge that the Respondent did not accord the Claimant the requisite notice of termination and had no valid reason.
35. Reliance was also made on the provisions of Section 41 of the *Employment Act* to urge that the tenets of procedural fairness were not complied with.
36. Similarly, the sentiments of the court in *Opiyo Benard Owino V Weichai Power Services & Spare parts Ltd (2019) eKLR* and *Munir Abubakar Masoud V Kenya Union of Commercial Food and Allied Workers & 3 others (2014) eKLR* were cited to urge that termination of the Claimant's employment was unfair both substantively and procedurally.



37. Counsel submitted that the Respondent had not proved that the Claimant absconded duty as no notice was issued to him.
38. Reliance was made on the sentiments of Radido J. in *Gibson Namasake V Linksoft Group Ltd* (2018) eKLR to urge that the Respondent tendered no evidence of when the Claimant allegedly absconded duty or the efforts it made to trace him as held in *Stephen Odeke Omukade V Lavington Security Guards Ltd* (2018) eKLR.
39. On entitlement to the reliefs sought, counsel submitted that the Claimant was praying for the sum of Kshs.455,473.00, general damages for defamation and declaration that termination of employment was unfair.
40. The declaration and general damages for defamation are neither pleaded nor proved.

Respondent's submissions

41. The Respondent's counsel submitted on whether termination of the Claimant's employment was unfair, the reliefs sought and costs.
42. On termination, counsel submitted that the Claimant absconded duty after he was re-assigned duty and attempts to reach him fell through and he was not available for a disciplinary hearing and was declared deserter.
43. The South African decision in *SABC V CCMA and others* (2002) 8 BLLR 693 (LAC) was relied upon for the definition of desertion.
44. Counsel urged that the Claimant had failed to prove that the Respondent terminated his employment on account of reading a newspaper.
45. That he had been issued with a Warning Order on 2nd November, 2015 (No. 409).
46. That his failure to report to work led to summary dismissal.
47. Counsel relied on the provisions of Section 43 and 45(2) of the *Employment Act*, 2007 to urge that the Respondent had a valid reason to terminate the Claimant's employment.
48. On the reliefs sought, counsel urged that the Claimant was a casual labourer either day or night and was paid for the days worked per month at a basic salary of Kshs.11,135/= less deductions, a fact he did not deny.
49. The decision in *Ronald Nyambu Daudi V Tornado Carriers Ltd* (2019) eKLR was cited to urge the court to award the Claimant Kshs.86,400/= as compensation.
50. Counsel urged the court to dismiss the suit.

Findings and determination

51. I have carefully considered the pleadings, evidence on record, submissions by counsel and the authorities cited.
52. The issues for determination are;
 - i. Whether the Claimant was a casual employee of the Respondent.
 - ii. Whether the Claimant's employment was terminated or he absconded.
 - iii. Whether the Claimant is entitled to the reliefs sought.



53. As to whether the Claimant was a casual worker, the Claimant's counsel did not address the issue while the Respondent pleaded that he was employed under a temporary contract and RWI testified he was a casual workers, while RWI confirmed that the Claimant served the Respondent consistently for the entire duration.
54. The Respondent's counsel submitted that the Claimant was a casual employee, paid monthly for the days worked less the statutory deductions.
55. Section 2 of the *Employment Act*, 2007 defines a casual employee as;

“A person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a period longer than twenty four hours at a time.”
56. The copy of a contract provided by the Respondent signed by the Claimant on 23rd January, 2023 is entitled “Temporary Employment Contract” and Clause 1 states that the Claimant was engaged for a period not longer than 90 days and wages were payable at the end of each month or at such other intervals as the company may agree.
57. The document makes no reference to a casual employee as defined in law.
58. In any event, even if the Claimant was engaged on a casual basis, which is not the case, he served the Respondent for a long time for his employment to have transitioned pursuant to the provisions of Section 37(1) of the *Employment Act*, 2007.
59. Moreover, RWII confirmed that the Claimant served continuously.
60. Needless to underscore, the Respondent adduced no evidence to prove that the Claimant's services were discontinuous or were interrupted at any point during his employment.
61. From the foregoing, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that the Claimant was a casual employee.
62. This finding is reinforced by the provisions of Section 10(7) of the *Employment Act*, 2007 on the burden of proof of the employer in instances such as this one.
63. As to whether the Claimant's employment was unfairly terminated or he absconded duty, parties have adopted contrasting positions. While the Claimant alleges that he served the Respondent until 1st November, 2015 when his employment was terminated, the Respondent pleaded, testified and submitted that the Claimant deserted his post after he was re-assigned duty.
64. Notably, the Claimant's evidence is reticent on by who, when and how his employment was terminated by the Respondent. His oral testimony in court made no reference to the circumstances in which his employment was terminated.
65. The allegation that he was found reading a newspaper sounded unbelievable as it would have elicited a warning order or reprimand. More significantly, the Respondent does not appear to have been aware of the incident and made no reference to it.
66. Be that as it may, the Respondent's case was consistent that the Claimant was a deserter.
67. According to Black's Law Dictionary (10th Edition), desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations.”



68. In *Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)*, the South African Court stated as follows;
- “ . . . Desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return.”
69. While RWI confirmed on cross-examination that the Claimant absconded duty on 16th November, 2015, RWII testified that he left on 8th November, 2015.
70. The Respondent availed an undated single page document, not under its logo informing the Claimant that he had been dismissed for desertion from 8th November, 2015.
71. The document is not addressed to any person and has no postal or email or other address and is signed for the Operations Manager.
72. RWII confirmed on cross-examination that the document was undated and was not forwarded to the Claimant and no letter was sent to the Claimant on the alleged desertion.
73. Although RWI testified that they called the Claimant on 8th and 17th November, 2015, he adduced no evidence of the calls or the mobile number they allegedly made the calls to.
74. In a nutshell, the Respondent adduced no demonstrable evidence of the reasonable steps it took to ascertain the whereabouts of the Claimant and urge him to resume duty or that he would be dismissed from employment if he failed to report to work.
75. The foregoing finds support in the sentiments of Onyango J. in *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR* and Ndolo J. in *Stephen Odeke Omukade V Lavington Security Guards Ltd (Supra)* cited by the Claimant.
76. According to Ndolo J.
- “ . . . It is now settled that an employer alleging desertion against an employee must demonstrate the efforts made to trace the deserting employee. At the very least, the employer is required to issue a notice to the employee that termination of employment on account of desertion is being considered.”
77. Nduma J. expressed similar sentiments in *Joseph Nzioka V Smart Coatings Ltd (2017) eKLR*.
78. As regards termination of the Claimant’s employment, the sentiments of Onyango J. in *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd (2020) eKLR* are instructive;
- “ Further, even if she absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the Respondent to show this court it did accord the Claimant a fair hearing prior to her termination.”
79. These sentiments apply on all fours to the circumstances in the instant suit.
80. It requires no gainsaying that for a termination of employment to pass muster, it must be demonstrated that the employer had a valid and fair reason to terminate the employment (substantive justification) and conducted it in accordance with fair procedure (procedural fairness) as observed by the Court of Appeal in *Naima Khamis V Oxford University Press (E.A) Ltd (2017) eKLR*.



81. From the foregoing, it is the finding of the court that the Respondent has neither adduced evidence to show that the Claimant deserted employment nor that his employment was terminated fairly as by law required.
82. On the reliefs sought, the court proceeds as follows;
- a. One month's salary in lieu of notice
83. The Respondent adduced no evidence that it gave the Claimant the requisite notice in accordance with the provisions of Section 35 of the Employment Act, 2007.
The same is awarded, Kshs.11,135.00.
- b. Annual leave
84. The Claimant tendered no shred of evidence either in his written witness statement nor the oral testimony that he had any pending leave days and how many they were.
The claim is dismissed for want of particulars.
- c. Salary arrears for October 2015
85. The Claimant adduced no scintilla of evidence to prove that the Respondent did not pay him the salary for October 2015.
86. Neither the written statement nor the oral evidence led in court make reference to any unpaid salary.
The claim is declined.
- d. House Allowance
87. This is a legal entitlement and the copy of the payslip availed by the Respondent has no entry for house allowance and the Respondent led no evidence that the Claimant's salary was consolidated.
88. The court is persuaded that the Claimant is entitled to house allowance at 15% of the basic salary. However, since the Claimant did not enforce this right when he realized it was being violated, he is only entitled to house allowance for 3 years prior to termination of employment only, the sum of Kshs.60,129.00.
- e. NSSF deductions
89. The Claimant testified that the Respondent deducted and remitted his NSSF contribution and documents availed by the Respondent attest to that fact.
The prayer is declined.
- f. Underpayment 2014 – 2015
90. The Claimant was untruthful on the gross salary he was earning as it was not Kshs.8,800/= as alleged. The payslip produced by the Respondent, whose contents the Claimant did not contest reveal that his gross pay was Kshs.11,135.00.
91. The minimum salary of a night guard from 1st May, 2013 to 30th April, 2015 was Kshs.10,911.70 exclusive of house allowance and from 1st May, 2015 to 30th April, 2017 it was Kshs.12,221.10 exclusive of housing allowance.
92. For 2014 – April 2015, since the salary was Kshs.11,135.00, there was no underpayment since the minimum salary was Kshs.10,911.70 but for the housing allowance which is awarded herein above.



93. For 1st May to 30th October, 2015, since the minimum salary was Kshs.12,221.10 and the Claimant was paid Kshs.11,135/=, the underpayment per month was Kshs.1,086.1 x 6 = Kshs.6,516.6.

The Claimant is awarded Kshs.6,516.60 as underpayment.

g. Compensation for unfair termination of employment

94. Having found that termination of the Claimant's employment was unfair for want of substantive justification and procedural fairness, the Claimant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007 upto a maximum of 12 months salary as compensations.

95. The court has taken into consideration the fact that;

1. The Claimant was an employee of the Respondent from 23rd January, 2008 to 1st November, 2015, a duration of about 7 years and 9 months is not too long.
2. The Claimant did not demonstrate that he wished to remain in the Respondent's employment.
3. The Claimant did not appeal the Respondent's decision.
4. The Claimant contributed significantly to the termination of his employment. Documents on record reveal that he at one time reported to the place of work without adorning his uniform and refused to sign the Warning Order No. 409, a fact he admitted in evidence and the same was reported to the union via email dated 19th November, 2015.

96. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.

97. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;

1. One month's salary in lieu of notice, Kshs.11,135.00.
2. House allowance at 15% basic pay for 3 years, Kshs.60,129.00.
3. Underpayment for May 2015 – October 2015, KShs.6,516.60.
4. Equivalent of 3 months gross salary, Kshs.33,405.00.
Total Kshs.111,185.60
5. Certificate of service.
6. Costs of this suit.
7. Interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 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

