



REPUBLIC OF KENYA



**Molo v Ten Senses Africa Limited (Cause 2001 of 2017)
[2023] KEELRC 1685 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2001 OF 2017**

JK GAKERI, J

JULY 13, 2023

BETWEEN

JOSEPHINE LOKO MOLO CLAIMANT

AND

TEN SENSES AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging unfair dismissal from employment and non-payment of terminal dues by the Respondent.
2. It is the Claimant's case that she was employed by the Respondent in July 2010 as a General Labourer and served continuously until November 2016 when she was dismissed from employment and her salary was Kshs.6,000/=.
3. The Claimant avers that in November 2016, the Respondent's Manager, one Maria informed her and other employees that the Respondent was no longer interested in retaining them as employees. That employees from Athi River and Mlolongo would be given preference.
4. That she continued reporting to the premises.
5. The Claimant further avers that she never proceeded on leave and was not housed by the Respondent and the dismissal from employment was unfair.
6. The Claimant prays for;
 - (a) A declaration that dismissal from employment was unfair.
 - (b) Respondent to pay the Claimant terminal dues and damages amounting to Kshs.515,256/= comprising;
 - (i) Pay in lieu of notice Kshs.6,000/=



- (ii) Pay in lieu of untaken leave Kshs.36,000/=
- (iii) Unpaid house allowance Kshs.68,400/=
- (iv) Unpaid overtime Kshs.84,000/=
- (v) Service/Gratuity Kshs.23,040/=
- (vi) Underpayment under the Regulation Wage Orders as follows;
2012 Kshs.44,715/= 2013 Kshs.84,962/=
- (vii) 12 months compensation Kshs.72,000/=.

Respondent's Case

- 7. By a response to the Memorandum of Claim filed on 27th September, 2018, the Respondent admitted that the Claimant was a casual labourer and denies having terminated her employment and averred that the Claimant breached the contract of employment by deserting and/or absenting herself from duty in November 2016 without lawful cause.
- 8. That the Respondent is an equal opportunity employer and does not discriminate.
- 9. The Respondent avers that it has no Manager by the name Maria.
- 10. That the Claimant's salary was inclusive and consolidated as part of the basic wage.
- 11. It denies having dismissed the Claimant from employment.
- 12. It is the Respondent's case that the Claimant absconded duty for over one (1) year and thus terminating employment.
- 13. The Respondent prays for dismissal of the suit with costs.

Claimant's Evidence

- 14. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
- 15. On cross-examination, the witness testified that her salary was Kshs.6,000/= per month and was engaged on a daily basis but paid monthly but had no copy of the contract of employment.
- 16. It was her testimony that she was dismissed by one Maria.
- 17. On re-examination, the Claimant testified that payment was twice a month.
- 18. That sometimes the nuts the Respondent dealt with were unavailable and had to be sourced from Taita.

Respondent's Evidence

- 19. Mr. Meshack Mulwa testified that the Respondent issued one-day contracts daily and paid every two (2) weeks.
- 20. That the Respondent had no employee by the name Maria at any point and employees worked for 8 hours from 8.00 am to 5.00 pm.
- 21. It was his testimony that the Claimant could not have worked continuously as Macadamia nuts are seasonal and most employees were from Nairobi.



22. On cross-examination, the witness confirmed that Claimant was employed under a written contract but had no evidence. He also confirmed the Claimant's salary as Kshs.6,000/= and payment was by MPESA but he had no evidence of payment or attendance sheets.
23. RWI testified that the Claimant absconded duty in 2015/2016 but he had no evidence of the absence and did not report to the labour office and was unsure of whether the Claimant was contacted to resume duty.
24. It was his testimony that although he joined the Respondent in 2012, he had all records of employees and none by the name Maria.
25. It was his testimony that those on one (1) day contract were not accorded leave.
26. On re-examination, the witness testified that casual labourers were recruited at the gate depending on availability.

Claimant's Submissions

27. Counsel addressed two issues namely; whether termination of the Claimant's employment was fair and entitlement to the reliefs sought.
28. As regards termination, it was submitted that the Claimant offered services continuously and even though she joined as a casual employer, her employment transitioned under Section 37 of the *Employment Act, 2007*.
29. Reliance was made on the provisions of Section 43 and 45(2) of the *Employment Act* to urge that the Respondent had to discharge its burden of proof for the termination of employment to pass muster.
30. The decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR was also cited to reinforce the submission.
31. Counsel urged that the Respondent had not tendered evidence to show that the Claimant absconded duty or the efforts made to ascertain her whereabouts.
32. On the process employed by the Respondent, counsel cited the provisions of Section 41 of the *Employment Act* to underscore the essence of procedural fairness in termination of employment.
33. The decisions in *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR, *Evans Ochieng Oluoch v Njimia Pharmaceuticals Ltd* [2018] eKLR and *Joseph Nzioka v Smart Coatings Ltd* [2017] eKLR were relied upon to underline the duty of an employer who pleads desertion in termination of employment and urge that the Respondent neither contacted the Claimant nor issued a notice to show cause and the alleged desertion was unproven.

Respondent's Submissions

34. Counsel isolated three issues for determination on whether the Claimant was a casual employee, was terminated by the Respondent and entitlement to the reliefs sought.
35. As regards the Claimant's employment, counsel submitted that since the Respondent's business was macadamia nuts which is seasonal, the Claimant was employed on term basis and it was incumbent upon the Claimant to prove that her employment indeed transitioned under Section 37 of the *Employment Act* and the Claimant did not seek production of documents.
36. Counsel submitted that the Claimant was a casual worker engaged on need basis.



37. Counsel relied on the decision in *Charles Kitbuka & 19 others v DPL Festive Ltd* [2022] eKLR.
38. On termination, counsel urged that the Respondent did not terminate the Claimant's employment as she deserted employment on her own accord as she tendered no evidence of having been terminated from employment.
39. Counsel relied on the provisions of Section 47(1) of the *Employment Act*.
40. Counsel urged that the Claimant did not discharge the burden of proof.
41. As regards the reliefs sought, counsel cited Section 2 of the *Employment Act* for a definition of a casual labourer to urge that the Claimant was a casual labourer and knew that Macadamia nuts were seasonal and had no evidence to prove that she worked on continuous basis and thus did not approach the court with clean hands.

Findings and Determination

42. The issues for determination are;
 - (i) Whether the Claimant was a casual labourer or not.
 - (ii) Whether termination of the Claimant's employment was unfair or she deserted duty.
 - (iii) Whether the Claimant is entitled to the reliefs sought.
43. As to whether the Claimant was a casual labourer or not, parties have adopted contrasting positions. While the Respondent contends that she was a casual employee based on its nature of business, the Claimant's counsel asserted that her employment transitioned under Section 37 of the *Employment Act*, 2007.
44. 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 longer period than twenty four hours at a time.
45. The Claimant confirmed on cross-examination that although she joined the Respondent as a casual employee, she was later paid monthly and was thus not a casual employee.
46. Similarly, RWI confirmed that the contract of employment was written but he had no copy to demonstrate the nature of the Claimant's employment. He also confirmed that the Claimant was paid twice a month at Kshs.6,000/=. He did not adduce evidence to prove that the Claimant's salary varied from time to time to reflect her casual employment as alleged.
47. Equally, the Respondent admitted in its response that the Claimant worked for the Respondent from 2010 to 2016 as a casual labourer but had no record of her attendance for the entire duration or evidence of how her salary was paid.
48. The retort that she could not have worked continuously since macadamia nuts were seasonal could not avail the Respondent which is obligated to keep and maintain employee records. More significantly, the Respondent did not tender evidence as to the season when it had no macadamia nuts and as such dismissed its employees or accorded them a break to await the next season.



49. Finally, Section 37(1) of the *Employment Act*, 2007 provides that;
- Notwithstanding any provisions of this Act where a casual employee –
- (a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - (b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1)(c) shall apply to that contract of service.
50. Needless to emphasize, the Respondent adduced no evidence to show that the Claimant’s services were discontinuous at any point during the 6 years of service. It did not avail a written contract to prove that the terms of engagement were daily and not more than 24 hours at a time and provided no evidence of payment to illustrate the casual status of the Claimant.
51. The foregoing finds support in Section 10(7) of the *Employment Act*, 2007 which provides that;
- If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
52. For the above stated reasons, the court is satisfied and finds that the Respondent has failed to prove that the Claimant was a casual employee from 2010 to November 2016.
53. As to whether termination of the Claimant’s employment was unfair or she absconded, while the Claimant submitted that it was unfair, the Respondent asserted that the Claimant deserted duty or absconded. RWI confirmed on cross-examination that she deserted in 2015/2016.
54. According to the *Black’s Law Dictionary* (10th Edition), desertion means;
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
55. In the often cited South African decision in *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), the 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.”
56. The oral evidence adduced by the Claimant is that her employment was terminated by word of mouth in November 2016.
57. The Respondent pleaded that the Claimant deserted the work place and submitted as much.
58. However, although RWI testified that the Claimant absconded duty in 2015/2016, he adduced no scintilla of evidence in support of the allegation. He led evidence of neither when the desertion took place or the steps the Respondent took to ascertain why she was not reporting for work or a notice to show cause that termination of employment on account of desertion was being considered.



59. The foregoing finds support in the sentiments of Onyango J. in *Felistas Acheba Ikatwa v Charles Peter Otieno* (*Supra*) cited by the Claimant’s counsel as follows;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

60. Nduma J. expressed similar sentiments in *Joseph Nzioka v Smart Coatings Ltd* (*Supra*).

61. In the instant case, the Respondent’s witness admitted on cross-examination that he had no evidence or record to show that the Claimant absconded duty, did not report the desertion to the Labour Office and was unsure of whether the Respondent contacted the Claimant. After all, he was not there and had no record of the desertion.

62. The provisions of the *Employment Act* are emphatic that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair. The employer must demonstrate that he had a valid and fair reason to terminate the employee’s employment and conducted the termination in accordance with a fair procedure as prescribed by Section 41 of the *Employment Act*, 2007.

63. These attributes were skilfully captured by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (*Supra*) cited by the Claimant’s counsel.

64. In sum, it is the finding of the court that the Respondent has neither adduced evidence of the fact that the Claimant absconded nor that her employment was terminated fairly as by law required.

65. It is the further finding of the court that termination of the Claimant’s employment was neither justifiable nor procedurally fair.

66. On the reliefs sought, the court proceeds as follows;

- (a) Having found that termination of the Claimant’s employment was unfair, a declaration to that effect is merited.
- (b) Terminal dues

(i) Payment in Lieu of Untaken Leave

67. The Claimant adduced no evidence to establish this claim and the relevant particulars are missing. Neither the written statement dated 6th October, 2016 nor the oral evidence adduced in court alluded to the untaken leave.

The claim is declined.

(ii) One Month’s Salary in Lieu of Notice

68. The Respondent adduced no evidence to prove that it accorded the Claimant the requisite notice. The Claimant is awarded Kshs.6,000/= as salary in lieu of notice.

(iii) Unpaid House Allowance

69. Strangely, the Respondent tendered no evidence of the Claimant’s daily wage, if she was indeed a casual employee. RWI confirmed on cross-examination that the Claimant’s salary was Kshs.6,000/=



but had no documentary evidence. Whereas under the relevant Regulation of Wages Orders daily and hourly rates are inclusive of housing allowance, the basic minimum monthly wage is exclusive of house allowance.

70. The Respondent adduced no evidence that it was paying the Claimant house allowance.

The Claimant is awarded house allowance at 15% of the basic salary for three (3) years only.

(iv) Unpaid Overtime

71. The Claimant adduced no evidence to establish entitlement to overtime or overtime earned.

72. Neither the written statement nor the oral evidence adduced in court make reference to working overtime and when.

73. Significantly, RWI testified that employees worked for 8 hours from 8.00 am to 5.00 pm.

The claim is dismissed.

(v) Service/Gratuity

74. The Claimant tendered no evidence that she was not a member of the NSSF or that the Respondent was not deducting and remitting her NSSF contributions. Her evidence is silent on the issue.

Equally, the Claimant adduced no evidence of entitlement to gratuity.

The claim is declined.

(vi) Underpayment

75. Since the Claimant was an employee of the Respondent from July 2010 to November 2016, the operative Regulation of Wages (General) (Amendment) Orders were those promulgated in May 2010 under which the minimum wage for a labourer was Kshs.6,743/= per month exclusive of housing allowance.

76. Under the Order published in May 2011, the minimum wage was Kshs.7,586/=.

77. Under the Order published on 1st May, 2012, the minimum wage was Kshs.8,579.80 per month while under the Order published in May 2013, it was Kshs.9,780.95/=.

78. Under the Order promulgated on 1st May, 2015, the minimum wage was Kshs.10,954/=.

79. Guided by the foregoing provisions of the Regulation of Wages (General) (Amendment) Orders, it is evident that the Claimant was indeed underpaid by the Respondent and is entitled to the underpayment.

80. It requires no gainsaying that underpaying an employee is a transgression of the law by the employer. The law prescribes the minimum daily, hourly and monthly wage to guarantee employees that there is a minimum below which an employer must not go. It is intended to imbue some dignity to the employee and cushion them against raising standard of living. An employer who does not pay the minimum wage violates the precepts of fair labour practices and the employee is entitled to recoup the underpayment. In this case, the Claimant's salary remained at Kshs.6,000/= for the entire duration of her employment.

The Claimant is awarded the underpayment for 3 years only.



(vii) Compensation

81. Having found that the Claimant's employment was unfairly terminated by the Respondent, the Claimant is entitled to the reliefs under Section 49(1)(c) of the *Employment Act*, 2007.
82. In determining the level of compensation, the court has taken into account the fact that;
- (i) The Claimant was an employee of the Respondent for about 6 years and 4 months which is not too long.
 - (ii) It is unclear to the court whether the Claimant wished to remain an employee of the Respondent.
 - (iii) From the evidence adduced by the parties, it is discernible that the Claimant was not free from blame.
 - (iv) The Claimant tendered no evidence on what she has been doing since termination of employment in 2016.
 - (v) The Claimant did not appeal the Respondent's decision to terminate her employment.
83. In the circumstances, the court is satisfied that the equivalent of 3 months salary is fair.
84. In the end, judgement is entered for the Claimant against the Respondent in the following terms;
- a. One month's salary in lieu of notice.
 - b. Unpaid house allowance for 3 years.
 - c. Underpayment for 3 years.
 - d. Equivalent of 3 month's gross salary.
(Counsels to compute and file in court for adoption within 30 days).
 - e. Costs of this suit.
 - f. Interest at court rates from date of judgement till payment in full.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH 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

