



**Pamba v Texas Alarms (K) Limited (Cause 2034 of 2017)  
[2023] KEELRC 1700 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1700 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2034 OF 2017**

**JK GAKERI, J**

**JULY 10, 2023**

**BETWEEN**

**PATRICK PAMBA ..... CLAIMANT**

**AND**

**TEXAS ALARMS (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a Statement of Claim filed on 11<sup>th</sup> October, 2017 alleging unfair termination of employment and non-payment of terminal dues.
2. It is the Claimant's case that he was employed by the Respondent on 29<sup>th</sup> November, 2014 as a night guard at Kshs.390/= per day paid after every two (2) weeks exclusive of house allowance and worked diligently until 4<sup>th</sup> May, 2016 when the Respondent suspended his services allegedly for having given false information and was dismissed from employment on 25<sup>th</sup> May, 2016 for no reason, notice to show cause or hearing.
3. The Claimant avers that he reported the dispute to the Labour Officer.
4. The Claimant prays for;
  - a. A declaration that termination of employment was unfair and wrongful.
  - b. Terminal benefits of Kshs.518,011.80 comprising;
    - i. One month's salary in lieu of notice.
    - ii. Salary during suspension.
    - iii. Leave pay for 1<sup>1</sup>/<sub>2</sub> years.
    - iv. Public holidays worked.



- v. Two days off-duty balance each month.
- vi. House allowance at 15%.
- vii. Uniform refund.
- viii. Salary underpayment.
- ix. Overtime worked.
- x. Service gratuity.
- xi. 12 months compensation.
- xii. Certificate of service.

### **Respondent's case**

5. In its Memorandum of Defense dated 13<sup>th</sup> December, 2017, the Respondent admitted that the Claimant was its employee as alleged but denies that he served diligently and was terminated from employment unfairly.
6. The Respondent avers that the amount owed is Kshs.16,310/=.
7. It is the Respondent's case that the Claimant absconded duty and was not dismissed from employment.
8. The Respondent prays for dismissal of the suit with costs.

### **Claimant's evidence**

9. The Claimant's evidence was given by his son.
10. On cross-examination, the witness confirmed that the signature on the letter of employment belonged to his father.
11. The witness confirmed that he was unaware of the father's suspension from duty and his father had not notified him of the alleged suspension neither did they work together and had no suspension letter.
12. The witness denies that his father absconded duty.

### **Respondent's evidence**

13. RWI confirmed that the Claimant's salary was Kshs.390/= per day and worked for 12 hours per day, 6 days a week and no overtime pay and did not work during public holidays, nor proceed on leave but was paid Kshs.5,000/= for leave.
14. That the Claimant's salary was inclusive of house allowance and he was a member of the NSSF and uniform deduction was refunded by Cheque No. 1818 handed over at the Labour Office.
15. The witness testified that the Claimant's employment was terminated on 25<sup>th</sup> May, 2016 after he absconded duty.
16. That neither a notice to show cause was issued nor hearing conducted.
17. The witness testified that the Respondent did not write to the Claimant after he absconded duty and terminal dues were paid at the Labour Office.



18. On re-examination, the witness testified that the Claimant's employment was terminated for insubordination and absenteeism.
19. RWI, Mr. Bernard Aduda's undated written statement uses the phrase "We" throughout the text and there is no activity he attributes to himself.
20. Puzzlingly, the witness states that on 1<sup>st</sup> May, 2016, the Operations Manager, one Gerald received a call from their client Lacheke Fuels & Lubricants.
21. RWII, on the other hand testified that it was he who received the call. It is unclear as to whether Jared (RWI) and Gerald being referred to was the same person.
22. On cross-examination, the witness confirmed that the Claimant's salary was Kshs.350/= per day yet it was contractually Kshs.390/= and no house allowance was paid. That the Claimant proceeded on leave and worked during public holidays at no extra pay and Kshs.500/= was deducted per month as uniform refund and overtime was being paid but had no evidence.
23. That the Claimant's last day at the work place was 1<sup>st</sup> May, 2016.
24. That when the Claimant absconded duty, they could not reach him. "We tried to call but I have no documentary evidence of the calls."
25. The witness testified that they paid the Claimant some money, pro-rata leave and uniform refund.
26. Intriguingly, the witness testified that the Claimant was not dismissed from employment as he absconded duty yet he testified on the contents of the summary dismissal letter dated 25<sup>th</sup> May, 2016.
27. The court's assessment of RWII's evidence reveals that it is based on what he had been told or heard and is unhelpful to the court.

### **Claimant's submissions**

28. The Claimant's counsel isolated three issues for determination on whether the Respondent had a valid and justifiable reason to terminate the Claimant's employment, observance of procedural fairness and entitlement to the reliefs sought.
29. On the reason for termination, counsel submitted that the alleged call from Madam Nipar was inadmissible as it was hearsay and the allegation of giving false information was not disclosed to the Claimant until he received the letter of dismissal.
30. Counsel relied on the decision in *David Situma Muyoi v Texas Alarms (K) Ltd* to reinforce the submission.
31. Counsel urged that the Respondent had relied on hearsay to terminate the Claimant's employment.
32. As to whether the Respondent observed procedural fairness, counsel cited the provisions of Section 41 of the *Employment Act* and the decision in *Fancy Jeruto Cherop & Nancy Jepkemoi Kiyai V Hotel Catby Ltd* (2018) eKLR to urge that the Respondent did not issue a notice to the Claimant to explain his whereabouts or summon him for a disciplinary hearing.
33. Reliance was also made on the decision in *Standard Group Ltd V Jenny Luesby* (2018) eKLR to reinforce the submission.
34. On entitlement to the reliefs sought, counsel submitted that the Claimant was entitled to all the reliefs sought.



## Respondent's submissions

35. The Respondent's counsel isolated similar issues for determination.
36. Counsel relied on the provisions of Sections 35, 44(3) and (4) of the *Employment Act*, 2007 to urge that the Claimant did not give the Respondent notice before he left employment and had committed gross misconduct by deserting the work place on 2<sup>nd</sup> May, 2016 and was not entitled to the benefits claimed.
37. On procedural fairness, reliance was made on Section 47(5) of the *Employment Act* and the decisions in *Jawadu Hamad Omar v East Africa Sea Food Ltd* and *John Kebaso Mose v Uchumi Supermarket* to urge that the Claimant had not discharged the burden of proof that his employment was unlawfully terminated by the Respondent.
38. On reliefs, counsel urged that since the Claimant absconded duty, the suit herein ought to be dismissed with costs.

## Findings and determination

39. It is not in dispute that the Claimant was employed by the Respondent on 29<sup>th</sup> November, 2014 as a night guard at Kshs.350/= per day payable after two weeks as per the Letter of Employment signed by the Claimant on 29<sup>th</sup> November, 2014. The wage appear to have been enhanced to Kshs.390/= day as the amount is not contested.
40. The Claimant's shift was for 12 hours either day or night and statutory deductions and union were made from the Claimant's salary.
41. Documents on record reveal that the Claimant reported the dispute between the parties to the Labour Officer on 20<sup>th</sup> June, 2016. The letter states that the Claimant's employment was terminated on 4<sup>th</sup> May, 2016 but no conciliation meetings were held owing to the Respondent's non-attendance of meetings on 22<sup>nd</sup> July, 2016 and 2<sup>nd</sup> September, 2016 as the letter by the Ministry of Labour dated 30<sup>th</sup> September, 2016 attests. The letter is a demand of the Claimant's terminal dues amounting to Kshs.93,083.10 payable at the Labour Office, Industrial Area on or before 15<sup>th</sup> October, 2016.
42. Although the email by RWI to Human Resource suggests that he was preparing to attend the meeting slated for 16<sup>th</sup> September, 2016 to avail data, he did not attend the meeting.
43. The Respondent did not honour the demand as the letter dated 22<sup>nd</sup> November, 2016 reveals.
44. It is unclear whether the Respondent honoured the demand in November, 2016.
45. According to a hand written note on the letter dated 20<sup>th</sup> June, 2016, the Claimant had terminated his employment by absconding duty. The date of desertion is undisclosed.
46. The Respondent indicated that it was in the process of paying the Claimant's dues but did not.
47. Finally, by letter dated 2<sup>nd</sup> September, 2016, the Respondent informed the Labour Officer that it had computed the Claimant's dues at Kshs.16,310/= comprising uniform refund and pro-rata leave. The Respondent tendered no evidence of payment of this sum.
48. A copy of the dismissal letter on record reveals that the Respondent terminated the Claimant's employment on 25<sup>th</sup> May, 2016 allegedly for absconding duty since 3<sup>rd</sup> May, 2016.



49. From the foregoing, the issues for determination are;
- i. Whether the Claimant deserted the work place or was unlawfully terminated by the Respondent.
  - ii. Whether the Claimant is entitled to the reliefs sought.
50. As regards desertion or unlawful termination, parties have adopted contrasting positions. While the Claimant alleges that he was unlawfully terminated from employment, the Respondent insists that he absconded duty.
51. Black's Law Dictionary 10<sup>th</sup> Edition defines desertion as;
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
52. In the often cited South African case 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.”
53. According to the Respondent, the Claimant was in the office on 2<sup>nd</sup> May to sort out an issue involving a client but when requested to write a statement and apologise, he walked away and did not return to the work place.
54. According to the Claimant, he was suspended from employment on 4<sup>th</sup> May, 2016.
55. RWI was unaware of the alleged suspension and the same remained an allegation.
56. The Respondent’s evidence appears more credible otherwise, if there had been a suspension, the dismissal letter would most likely have made reference to the same. It did not.
57. Relatedly, the Claimant did not testify by whom and how the suspension was communicated and what its terms were.
58. The court is unpersuaded that the Claimant has demonstrated that he was suspended from employment by the Respondent at any point during his employment.
59. It is clear to the court that there was an outstanding issue with a client and it was not concluded as between the Claimant and the Respondent.
60. However, even if the Claimant absconded duty on 3<sup>rd</sup> May, 2016, the Respondent tendered no evidence of the reasonable steps it took to ascertain why he was not reporting for work and why it did not invite him for a disciplinary hearing for the absence from duty as held in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR.
61. The Respondent adduced no evidence that it took any steps to ascertain the reasons of the Claimant’s absence or notify the Labour Officer.
62. Similarly, as held in *Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd* (2020) eKLR, even if the Claimant had absconded, he was still entitled to a fair disciplinary process guaranteed by the provisions of Section 41 of the Employment Act, 2007.
63. The Respondent tendered no evidence of a disciplinary hearing or process.



64. For the foregoing reasons, it is the finding of the court that the Respondent has failed to prove on a balance of probabilities that the Claimant deserted the work place.
65. As regards termination, it requires no belabouring that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as ordained by the provisions of Sections, 41, 43 and 45 of the Employment Act, 2007 and as aptly captured by Ndolo J. in Walter Ogal Anuro V Teachers Service Commission (2013) eKLR and the Court of Appeal in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR.
66. On reasons(s) for termination, as held above, the Respondent failed to prove that the Claimant deserted duty, the only reason outlined by the letter of summary dismissal dated 25<sup>th</sup> May, 2016.
67. As regards procedural fairness, the Respondent adduced no evidence that it complied with the procedural tenets prescribed by the provisions of Section 41 of the Employment Act, 2007.
68. In sum, the Respondent adduced no evidence of desertion of duty or fair termination of the Claimant's employment.
69. Consequently, it is the finding of the court that termination of the Claimant's employment was substantively and procedurally unfair.

#### **Reliefs**

70. Having found that termination of the Claimant's employment was unfair, the court proceeds as follows;
  - a. A declaration is hereby issued that termination of the Claimant's employment was unfair for non-compliance with the provisions of the Employment Act, 2007.
  - b. Terminal benefits

#### **i. One month's notice**

71. The Respondent tendered no evidence that it accorded the Claimant the requisite notice.  
One month's salary is awarded as pay in lieu of notice.

#### **ii. Salary during suspension 5<sup>th</sup> May, 2016 to 25<sup>th</sup> May, 2016**

72. The Claimant adduced no credible evidence of the alleged suspension from employment.  
The prayer is dismissed.

#### **iii. Leave for 1<sup>1/2</sup> years**

73. The Respondent tendered no evidence that the Claimant proceeded on leave at any time.
74. Leave is a statutory right and the Claimant is awarded pro rata leave for the duration served of 1<sup>1/2</sup> years less any amount already paid.

#### **iv. Public holidays worked**

75. The Claimant provided no particulars of the public holidays worked and when. Each year has its public holidays.  
In the absence of particulars, the prayer is declined.



#### **v. Two days off-duty balance**

76. Neither the Claimant's written statement nor the oral evidence adduced in court make reference to off-days.

The absence of particulars and evidence render the claim unsustainable.

The prayer is declined.

#### **vi. House allowance**

77. It is not in dispute that the Claimant's salary was based on daily wage, he was not a casual employee and the Respondent adduced no evidence on how it was paying his salary as it did not avail a copy of his payslip.

78. In the absence of documentary evidence on how the salary was being paid, the court will proceed on the basis of the Letter of Appointment availed by both parties as evidence of the employment relationship.

79. The Claimant was earning Kshs.390/= per day paid every two weeks and the Letter of Appointment was explicit that the amount was inclusive of house allowance and the Claimant signed the letter and was thus bound by it. This is consistent with the Regulation of Wages (General) (Amendment) Orders that the minimum daily wage is inclusive of housing allowance.

80. In the circumstances, the prayer for house allowance is unsustainable and is declined.

#### **vii. Uniform Refund**

81. From the evidence on record, it is unclear to the court as to how the uniform deductions were being done. Neither of the parties testified on the frequency of the deductions.

82. The challenge is exacerbated by the absence of copies of payslips.

83. The Respondent had assessed it at Kshs.5,000/= while the Claimant prays for Kshs.9,000/= on the basis that the deductions were monthly, a fact the Claimant did not testify about.

In the circumstances, the Claimant is awarded the actual amount deducted.

#### **viii. Salary underpayment**

84. Since the Claimant was employed as a night guard, it is clear that the daily rate of Kshs.390/= was below the prescribed minimum. Under the Regulation of Wages (General) Amendment) Order, 2013, effective 1<sup>st</sup> May, 2013 to 30<sup>th</sup> April, 2015, the minimum daily rate for a night guard was Kshs.523.60 which translates to an underpayment of Kshs.133.60 per day, which translates to Kshs.13,613.60 per month against a salary of Kshs.10,140/= per month an underpayment of Ksh.3,473.60 per month translating to (3,473.60 x 5 months) = Kshs.17,368/=.

85. Similarly, under the Regulation of Wages (General) (Amendment) Order, 2015 effective May 2015, the minimum daily rate was Kshs.586.40 which reveals an underpayment of Kshs.196.40 which translates to a monthly salary of Kshs.15,246.4 against a monthly salary of Kshs.10,140/=, an underpayment of Kshs.5,106.4 per month from 1<sup>st</sup> May, 2015 to 25<sup>th</sup> May, 2016, a duration of 12 months and 18 days which translates to an underpayment of Kshs.71,831.2 which the court hereby awards.

#### **ix. Overtime worked**

86. The Claimant prays for Kshs.173,664.00 as overtime pay for the duration of his employment.



87. Whereas it is common ground that the Claimant's shift was 12 hours, the contract of employment which the Claimant executed on 29<sup>th</sup> November, 2014 is unambiguous that the daily wage payable was inclusive of overtime payment.
88. Having signed the contract, the Claimant was bound by its terms.
89. At common law, signature prima facie signifies acceptance as exemplified by the decision in *L' Estrange V Graucob* (1934) 2 KB 394.
90. Similarly, in *Parker v South Eastern Railway Co. Ltd* (1877) 2 C.P.D 416 Mellish L.J. stated as follows;
- “ In an ordinary case where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.”
91. The duty of the court is inter alia to give effect to the intention of the parties as expressed in their agreement as held in *Domandar Jibabhai & Co. Ltd and another v Eustace Sisal Estates Ltd* (1967) EA 153.
92. For the foregoing reasons, the prayer for overtime is declined.

#### **x. Service gratuity**

93. Although the Claimant tendered no evidence to demonstrate his weekly or monthly salary and the deductions if any, the Respondent tendered no evidence that it was indeed making the necessary statutory deductions which are obligatory.
94. In the absence of such evidence, the Claimant is awarded service pay of Kshs.7,139.00 for the duration served in accordance with the provisions of Section 35(5) of the *Employment Act*, 2007.

#### **xi. 12 months compensation**

95. Having found that termination of the Claimant's employment was unfair for want of a substantive justification and procedural fairness, the Claimant is entitled to the relief provided by Section 49(1) (c) of the *Employment Act*, 2007.
96. In determining the quantum of compensation, the court has taken into account the following;The Claimant was an employee of the Respondent from 29<sup>th</sup> November, 2014 to 25<sup>th</sup> May, 2016, a duration of about 1<sup>1</sup>/<sub>2</sub> years which is fairly short duration.The Claimant did not appeal the decision of the Respondent or indicate his desire to remain in employment of the Respondent.The circumstances in which the Claimant's employment was terminated reveal that there was an outstanding issue and the Claimant does not appear to have reported to work from 3<sup>rd</sup> May, 2016. The letter from the Ministry of Labour show that his complaint was that his employment was terminated on 4<sup>th</sup> May, 2016, which is not the case as the court has already determined.The Claimant, the court is satisfied significantly contributed to the termination of his employment.
97. In the circumstances, the court is satisfied that the equivalent of two (2) months salary is fair, Kshs.30,492.8.

#### **xii. Certificate of service**

98. The Claimant is entitled to a certificate of service by virtue of the provisions of Section 51 of the *Employment Act*, 2007.



99. In the upshot, judgement is entered for the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment was unfair.
- b. One month's salary in lieu of notice.
- c. Pro rata leave for the duration served.
- d. Actual amount deducted for uniform.
- e. Salary underpayment of Kshs.89,199.20.
- f. Service pay of Kshs.7,139.00.
- g. Equivalent of 2 months' salary.
- h. Costs of this suit.
- i. Certificate of service.
- j. Interest at court rates from date of judgement till payment in full.

PARA 100 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

