



REPUBLIC OF KENYA



KENYA LAW
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**Osebe v Manpower Networks Limited (Cause 1901 of 2017)
[2023] KEELRC 1745 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1901 OF 2017**

JK GAKERI, J

JULY 11, 2023

BETWEEN

HENRY OBWONGE OSEBE CLAIMANT

AND

MANPOWER NETWORKS LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on September 25, 2017 alleging unfair termination of employment.
2. The Claimant avers that he was employed by the Respondent in July 2012 as a cement loader on permanent and pensionable terms at Kshs 21,037/= per month and seconded to Bamburi Cement Co Ltd and worked diligently until September 27, 2016 when his employment was wrongfully terminated by the Respondent without notice or reason.
3. It is the Claimant's case that he applied for leave on September 1, 2016 due to return on September 27, 2017 and when he reported, he was turned away and instructed not to report to work again and his salary for September 2016 was not paid as were public holidays worked and off-days.
4. The Claimant prays for;
 - i. Notice pay Kshs 21,037/=.
 - ii. House allowance Kshs 148,500/=.
 - iii. Salary for September 2016 Kshs 21,037/=.
 - iv. Unpaid off-days Kshs 184,615/=.
 - v. Holiday pay Kshs 61,538.40/=



- vi. Damages for wrongful dismissal Kshs 240,000/=
- vii. Certificate of service.
- viii. Any other relief the court may deem fit to grant.
- ix. Costs of the cause.

Respondent's case

5. The Respondent filed a Memorandum of Reply on October 24, 2017.
6. The Respondent denies that the Claimant was its employee or was unfairly dismissed from employment.
7. It avers that the Claimant was paid his salary for September 2016 and acknowledged receipt of all terminal dues.
8. The Respondent prays for a declaration that the Claimant's employment was fairly terminated and the suit be struck out with costs.

Claimant's evidence

9. The Claimant's written statement replicates the contents of the Memorandum of Claim.
10. On cross-examination, the Claimant confirmed that he applied for leave on September 1, 2016 and returned on September 27, 2016 and his salary included overtime pay.
11. That he proceeded on leave regularly and off-days.
12. Strangely, the witness stated that the Respondent had no application leave forms.
13. The witness confirmed that he signed the terminal dues form dated October 10, 2016 and received Kshs 11,606/= after reporting back from leave.
14. That he used to work on public holidays but did not work during the Christmas holidays.
15. On re-examination, the witness stated that he could not recall when he proceeded on leave.
16. A critical review of the Claimant's evidence reveals that he was not entirely truthful.

Respondent's evidence

17. RWI, Mr. James Tsuma testified that the Respondent employed the Claimant as a PH Loader on August 1, 2012 to October 31, 2013 and thereafter as a Silo Attendant under a contract dated November 1, 2013 to July 31, 2015 and his employment was contractual not permanent and his remuneration varied with the contract entered into.
18. The witness testified that the Claimant absconded duty before the contract ended and never reported to work on September 1, 2016 and attempts to reach him were unsuccessful initially but thereafter succeeded and the Claimant indicated that he was busy elsewhere and no longer interested in working for the Respondent and was requested to clear and did so on October 10, 2016.
19. On cross-examination, the witness confirmed that the contract dated August 1, 2015 was to run from that date to December 31, 2016 but the Claimant deserted duty before it ended and his basic salary was Kshs 16,500/= and was paid.



20. That the Claimant had no permission to be on leave as he had not signed a leave form and attempts to reach him fell through.
21. That the Claimant was paid overtime for extra hours worked and his salary was inclusive of house allowance.
22. On re-examination, the witness stated that when the Claimant failed to report back to Bamburi Cement, the company reached out to the Respondent and he was requested to collect his dues.

Claimant's submissions

23. Counsel for the Claimant addressed two issues, on whether termination of employment was unfair and the Claimant's entitlement to the reliefs sought.
24. On the 1st issue, counsel relied on the sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR to urge that for a termination of employment to be fair, there must be a substantive justification and procedural fairness.
25. On the justification, counsel relied on the provisions of Section 45(2) of the *Employment Act* to urge that Respondent had failed to establish that the Claimant absconded duty and cited the sentiments of the Court in *Godfrey Anjere V Unique Suppliers Ltd* (2013) eKLR.
26. Counsel submitted that if the Claimant had absconded duty, a notice to show cause ought to have been issued.
27. Counsel urged that the Claimant was on leave.
28. Reliance was also made on the sentiments of Onyango J. in *William Gituma Gateere v RAA Ltd* (2020) eKLR.
29. On procedure, reliance was made on the sentiments of Wasilwa J. in *James Nyaboga Nyabonda V Menengai Oil Refineries Ltd* (2021) eKLR to urge that the Claimant was not subjected to a disciplinary process for absconding duty.
30. It was submitted that the provisions of Section 41 were not complied with.
31. On entitlement to the reliefs sought, counsel relied on the provisions of Section 31 of the *Employment Act* and Regulation 5 of the *Regulation of Wages (Protective Security Services) Order, 1998* to urge that the Claimant was entitled to house allowance at 15% of the basic pay as the Respondent provided no evidence of a payslip to prove that it paid a housing allowance.
32. The decision in *Andrew Waitbaka Kiragu v Grain Pro Kenya Inc. Ltd* (2017) eKLR was cited to buttress the submissions.
33. On holiday pay, reliance was made on the provisions of Section 10(3)(a)(i) of the *Employment Act* on double compensation for public holidays worked.
34. Counsel submitted that the Claimant was entitled to all the reliefs sought.

Respondent's submissions

35. Counsel for the Respondent addressed similar issues.
36. On termination of employment, counsel relied on the provisions of Section 44(4)(a) of the *Employment Act, 2007* to urge that the Claimant deserted duty and attempts to reach him were unsuccessful until he was requested to clear which he did on October 10, 2016.



37. The decision in *Joseph Njoroge Kiama v Summer Ltd* (2014) eKLR was cited to reinforce the submission as was the decision in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
38. As regards entitlement to the reliefs sought, counsel relied on Section 107(1) of the *Evidence Act* to urge that the Claimant had not proved entitlement to off-days and holiday pay.
39. The decisions in *Jennifer Nyambura Kamau V Humphrey Mbaka Nandi* (2013), *Patrick Lumumba Kimuyu V Prime Fuels (K) Ltd and Rogoli Ole Manadiegi V General Cargo Services Ltd* (2016) eKLR were relied upon to urge that the Claimant had not discharged the burden of proof.
40. On housing allowance, counsel relied on the provisions of Section 31 of the *Employment Act, 2007* to urge that the Claimant Counsel's submission notwithstanding, the contract of employment availed by the Respondent provided that the Claimant's salary was consolidated and thus inclusive of house allowance and the Claimant was not entitled to any payment as housing allowance.
41. Finally, counsel submitted that no other payment was due to the Claimant as his final dues had been paid and the suit should be dismissed with costs.

Findings and determination

42. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought or waived his right to pursue further claims against the Respondent.
43. On termination of employment; parties have adopted contrasting positions. While the Claimant alleges that it was unfair as no notice or reason was given, the Respondent maintains that the Claimant deserted duty.
44. It is therefore essential to determine whether the Claimant deserted duty or his employment was unfairly terminated.
45. According to *Black's Law Dictionary*, 10th Edition, desertion means;

“The wilful and unjustified abandonment of a person's duties or obligations.”
46. In the often cited South African case of *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated as follows;

“... desertion is distinguishable from absence without leave, in that an 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.”
47. According to the Respondent, the Claimant absconded duty before the last contract of employment lapsed and attempts to reach him by the Operations Manager fell through on September 1, 2016 but reached him a few days later when he allegedly expressed his disinterest in working for the Respondent. However, the witness had no evidence of the alleged calls or the number he allegedly called.
48. More significantly, however, the Respondent's witness availed no evidence on what he did after the Claimant absconded duty for purposes of closure of the issue of his employment.



49. The emerging jurisprudence on the defence of desertion is clearly that the employer must adduce evidence to demonstrate the reasonable steps it took to reach out to the employee to resume duty and subject him or her to a disciplinary process.
50. In *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR, Onyango J. held 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.”
51. Similar sentiments have been expressed in countless decisions such as *Simon Mbiti Mbane V Inter Security Services Ltd* (2018) eKLR, *Joseph Nzioka V Smart Coatings Ltd* (2017) eKLR and *Boniface Francis Mwangi V B.O.M Iyego Secondary School* (2019) eKLR among others.
52. In this case, the Respondent tendered no verifiable evidence of the steps it took to ensure that the Claimant resumed work.
53. The court is further guided by the sentiments of Onyango J. in *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* as follows;
- “Further, even if she had 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 accorded the Claimant a fair hearing prior to her termination.”
54. These sentiments apply on all fours to the facts of the instant suit.
55. The Respondent adduced no evidence to prove that it accorded the Claimant an opportunity to defend himself on the allegation of desertion.
56. As correctly submitted by the Claimant’s counsel, for a termination of employment to pass muster, it must be demonstrated that the employer had a substantive justification to terminate the employment and conducted the same in accordance with fair procedure as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teacher Service Commission* (Supra) cited by the Claimant’s counsel.
57. In this case, the Respondent has not demonstrated any of these requirements.
58. In sum, the Respondent has neither evidentiary demonstrated that the Claimant deserted duty in September 2016 or his employment was fairly or lawfully terminated.
59. As to whether the Claimant is entitled to the reliefs sought or waived his right to pursue further claims against the Respondent, the court proceeds as follows;
60. As regards waiver of the right to sue, typically associated with discharge vouchers and settlement agreements or certificates, the guiding principles are well settled by the Court of Appeal in various authoritative decisions.
61. In *Coastal Bottlers Co Ltd v Kimathi Mithika* (2018) eKLR, the court held as;
- “Whether or not, a settlement agreement or discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such



an issue, in our view, should address its mind firstly on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties.”

62. In the instant case, the Respondent executed the terminal dues form which stated inter alia;

“ . . . I confirm that, I have no further claim against the company whatsoever.”

63. The court was satisfied that the parties had agreed that payment of the sum of Kshs 11,606/= would absolve the Respondent from further liability under the contract of employment and there was no evidence of misrepresentation, duress or undue influence.

64. Similarly, in *Trinity Prime Investment Ltd V Lion of Kenya Insurance Co Ltd* (2015) eKLR, the court of stated as follows;

“The execution of the discharge voucher, we agree with the learned judge constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged.”

65. The foregoing sentiments are grounded on the principle of freedom of contract under which parties are at liberty to agree on the terms of the contract as they may deem necessary and may do so by word of mouth, in writing or by conduct.

66. The fundamental and overriding obligation of the court is to give effect to the intention of the parties as held in *Damondar Jibabhai & Co Ltd and another V Eustace Sisal Estates Ltd* (1967) EA 153.

67. In the instant case, the Claimant admitted on cross-examination that he signed the terminal dues form and the Disclaimer Forms voluntarily and received Kshs 11,606/=.

68. The Claimant did not question the veracity of the terminal dues form which read in part;

Re: Terminal Dues

Please refer to our latter dated We wish to confirm that the company will not require your services with effect from

In this regard we wish to pay your terminal dues as below;

Accrued salary upto October 2016 Kshs 16,455/=

Unused leave Kshs.....

Payment in lieu of notice Kshs.....

Deductions

PAYE Kshs 769/=

Salary advance Kshs 3,000/=

Others Kshs 10.80/=(unclear)

Total Deductions Kshs 4,849/=

Amount payable Kshs 11,606/=

Sincerely



.....

For

Manpower Networks Ltd

Kindly sign below to confirm the foregoing.

I Henry Osebe of I.D. No. xxxx confirm the receipt of my final dues and accept that I have no further claims against Manpower Network Limited and/or their clients.

Signature: Signed Date: 10/10/2016

69. For unexplained reasons, the Claimant accepted final terminal dues before his contract of employment lapsed in December 2016.
70. A reading of the document would appear to suggest that the parties thereto had a mutual separation contrary to the Claimant's assertion that he was told to go away with no reason or explanation and did not demand anything from the Respondent until 28th April, 2017, almost 7 months later and filed a case in September.
71. It is unclear as to why the Claimant did not protest his alleged abrupt termination of employment to the employer or Labour Office or anyone. The Claimant's conduct in this case is atypical of an employee whose employment has been terminated without notice. He appears to have left on his own accord.
72. Intriguingly, the Claimant provided a single copy of a payslip dated September 2015. The Respondent availed none.
73. Similarly, the Claimant signed a Disclaimer Form stating that he had received Kshs 11,606/= in full as part of salary. The form was also signed by one Simon Mutuma as a witness on 10th October, 2016.
74. These two documents on which the Claimant inserted his name, Identity Card number and signature on 10th October, 2016 would appear to show that the parties separated mutually with no outstanding dues.
75. It requires no belabouring that at common law signature prima facie means acceptance. As was held in *L'Estrange V Graucob* (1934) 2 KB 394.
76. The documents are a testimony of the fact that something happened in September 2016 or at an earlier date and the parties agreed to separate on amicable terms.
77. In the premises, it is the finding of the court that the Claimant had by his signature waived the right to pursue further claims against the Respondent.
78. In the upshot, the issue of the Claimant's entitlement to the reliefs sought does not arise as the suit is unsustainable and is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH 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

