



**Noor Aluminium and General Hardware Ltd v Katiki (Civil Appeal E119 of 2021) [2023] KEELRC 2037 (KLR) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2037 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL E119 OF 2021  
AN MWAURE, J  
AUGUST 18, 2023**

**BETWEEN  
NOOR ALUMINIUM AND GENERAL HARDWARE LTD ..... APPELLANT  
AND  
GERALD MBULI KATIKI ..... RESPONDENT**

**JUDGMENT**

1. The Appellant filed this appeal vide a Memorandum of Appeal dated 8<sup>th</sup> October 2021 which appeal is based on the grounds that Hon. D W Mburu, SPM in the judgement dated 24<sup>th</sup> September 2021, erred in fact and law in finding the Respondent’s employment was unlawfully terminated for the following reasons:-
  - i. Respondent confirmed that he was never issued with a termination letter.
  - ii. Respondent’s evidence and submissions are inconsistent
  - iii. Respondent was unable to substantiate why he declined to report back despite several letters to his advocate to report to work.
  - iv. Respondent was unable to prove sufficient evidence of communication with the appellant.
  - v. Respondent could not ascertain why he did not heed to the applicant’s demand to give reasons on being absent.
  - vi. The Respondent evidence was not supported by any records vis a vis the Respondent’s defence which was supported by records and letter as a result the word of mouth evidence could not hold water on a balance of probability and therefore the claim could not stand.
2. The Appellant’s prays for the following orders:-
  - i. This Appeal be allowed



- ii. This Honourable court do set aside, overturn and/or quash the judgement of the lower court dated 24<sup>th</sup> September 2021.
- iii. Costs in the trial court and in this Appeal.

### **The Appellant's Submissions**

3. The Appellant submitted that the trial court did not place enough weight on the issue of desertion of duty by the Respondent. The Appellant submitted its witness DW1 testified that on 7<sup>th</sup> November 2019, the Respondent reported late and was reprimanded and that the verbal warning was followed by a formal warning letter. However, before issuance of the written warning letter the Respondent deserted duty without notice until the Appellant received a demand letter from his advocates dated 8<sup>th</sup> November 2019 alleging unfair termination which the Appellant responded to vide a letters dated 11<sup>th</sup> November 2019 and 26<sup>th</sup> November 2019 requesting the Respondent to report back to work and the latter expressing its displeasure on the Respondent's desertion of duty. The Respondent failed to respond to the letters but instead instituted this suit.
4. The Appellant submitted that upon the Respondent's desertion it made reasonable efforts to reach the Respondent and that the Respondent has made the threshold in *Philomena Kiprotich Kirui vs Lessos Veterinary Suppliers Ltd [2016] eKLR* in which the court found:-

“An employer who terminates the services of an employee on grounds of abscondment or desertion has to demonstrate and/or prove that the employee had no intention of resuming work.”
5. The Appellant further submitted the trial court erred in its finding that the Respondent was unlawfully terminated by failing to follow due procedure as the Appellant did not accord the Respondent any hearing before concluding he deserted duty. The Appellant submitted the question of desertion was factual and posed a question to the court, where would the Appellant have sourced the Respondent from to conduct a hearing?

### **Submissions**

6. The Respondent submitted that the Appellant's allegations of his persistent lateness and improper conduct were wild allegations neither supported by oral nor documentary evidence.
7. The Respondent submitted that the Appellant never followed up on his alleged desertion of duty and only communicated when the Respondent served it with the demand letter and the email dated 26<sup>th</sup> November 2019 in which its advocates wrote to the Appellant's raising the issue that he reported to work on 18<sup>th</sup> November 2019 but he was denied entry.
8. The Respondent submitted that analysis and determination of the trial court cannot be faulted and that the trial court clearly found that the Respondent had been unfairly terminated.
9. The Respondent submitted that the Appellant failed to prove the grounds of appeal set out in the memorandum of appeal and urged that the court to dismiss the appeal with costs.

### **Analysis and determination**

10. Arising from the grounds of appeal, the following are the issues for determination:
  - a. Whether the trial court erred in its decision that the Respondent was unfairly terminated?



- b. Whether the Appellant is entitled to reliefs sought?

**Whether the trial court erred in its decision that the Respondent was unfairly terminated?**

11. The Appellant argues the trial court erred in its finding that the Respondent was unlawfully terminated by failing to follow due procedure as the Appellant did not accord the Respondent any hearing before concluding he deserted duty. This begs the question what are conditions to be satisfied before an employer concludes that an employee has deserted duty? This is clearly set out in *Boniface Nkubi Karagania vs Protective Custody Limited* [2019] eKLR where the court held:-

“The Claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal, the Respondent failed to produce any evidence that the Claimant deserted duty. It was only averred in the Respondent’s defence which remained mere allegations as the correspondence alluded to by the Respondent demonstrating the absence of intention to resume work was not produced in evidence. Desertion necessarily entails the employee’s intention to no longer return to work. The employer would have to establish this intention in a fair process. Desertion requires an employer to infer an intention on the part of the employees, as a result of such employee’s conduct, that the employee simply has no intention to return to work. The intent to discontinue employment must be shown by clear proof that it was deliberate and unjustified and because abandonment is a matter of intention and cannot merely be presumed from certain equivocal acts, it must be demonstrated. It cannot be argued the fact that an employee simply disappeared from their workplace, they are guilty of abandonment. The absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work anymore and the burden of proof for the unjustified refusal to go to work rests on the employer.”

12. In *Vincent Makori Momanyi v Techpak Industries Limited* [2022] eKLR the court held:-

“Desertion of duty is one of those acts obtaining in the catalogue set out in Section 44 of the *Employment Act, 2007*, that will, if committed by an employee amounts to gross misconduct, and consequently able to attract the penalty of summary dismissal. For this reason, the consequence, there is firm jurisprudence that an employer alleging desertion must show the efforts he made to reach out to the employee and putting him on notice that termination of his or her employment was in contemplation..... Desertion from service must be a voluntary act on the part of the concerned employee and in order to draw any inference in this regard, intention of the concerned employee should be taken into consideration. In this circumstance, refusal of access to the place of work, it is impossible to arrive at a conclusion that there was a voluntary relinquishment on the part of the Claimant.”

13. In a bid to prove that it reached out to the Respondent, the Appellant availed to the court letters and email addressed to the Respondent’s advocates and not the Respondent and therefore failed to prove the Respondent was adequately served with calls to go back to work. To prove service, the court in *Vincent Makori Momanyi v Techpak Industries Limited* [2022] eKLR held:-

“In my view, in circumstance like in this matter, it is not enough for the employer to state that it wrote a letter to the employee. It must demonstrate to the requisite standard that indeed the letter left its address to the employee. In essence service of the alleged letter or



communication must be proved. Prove of service could entail evidence of postage like a certificate of postage, an extract of a postage register for the relevant day, a statement or affidavit by the person who posted the letter, for example.”

14. In his judgment delivered on 24<sup>th</sup> September 2021, the trial judge states:-

“In the circumstances of this case, I do hereby find and hold that the Respondent unlawfully terminated the Claimant’s employment by failing to follow due procedure. I do not agree with the Respondent’s contention that the Claimant absconded his duty because when the Claimant reported back on 18<sup>th</sup> November 2019, he was denied entry to the Respondent’s premises.”

15. The court is also guided by the case of Civil Appeal No 032 of 2021 of John Bwire vs Joram Said & Others where the court held: “ a first appellate is mandated to reevaluate the evidence before the trial court as well as the judgment to arrive at its own independent judgment on whether or to allow an appeal. A first appellate court is empowered to subject the whole of evidence to fresh and exhaustive scrutiny and make conclusions about it bearing in mind that it did not have opportunity of seeing and hearing the witness first hand.”

16. It further went to state “it is a strong thing for an appellate court to differ on findings on a question of fact of the judge who has had the advantage of seeing and hearing the witness.”

17. The appellate court has power of course to review and set aside judgment from the lower courts but great caution must be exercised in view of the above obiter.

18. Flowing from the pleadings and submissions of the respective parties this court finds the trial magistrate was right in finding the appellant did not tender sufficient evidence of abscondment by the respondent and so this appeal fails and is dismissed. Each party will meet its costs of this appeal. Costs of the lower court had already been awarded to the respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST 2023.**

**ANNA NGIBUINI MWAURE**

**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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**



**JUDGE**

