



Ngure v Steel Structures Limited (Employment and Labour Relations Cause 1089 of 2016) [2023] KEELRC 2070 (KLR) (9 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 2070 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1089 OF 2016
AN MWAURE, J
AUGUST 9, 2023**

BETWEEN

ANTHONY KOMBO NGURE CLAIMANT

AND

STEEL STRUCTURES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 7th June 2016 in which he avers that he was unlawfully and unfairly terminated.
2. The Claimant seeks the following reliefs:-
 - a. A declaration that the Respondent's action in dismissing the Claimant from employment was unlawful and unfair.
 - b. A sum of Kshs. 1,770,130/- particularized in paragraph 6 of his claim.
 - c. Damages for loss of salaries and allowances from January 12, 2015 to the date of determination of this claim herein at Claimant's gross salary at the figure of Kshs. 17,910/- per month.
 - d. Certificate of Service
 - e. Costs of this cause.
 - f. Interest on (b), (c) and (e) above at present court rates
 - g. Any other reliefs this honourable court may deem fit and expedient to grant.



The Claimant's case

3. The Claimant avers that he was employed by the Respondent as a casual labourer at a salary of Kshs. 17,910 per month on September 16, 2009.
4. He further avers that on October 13, 2014, he was assigned by the Respondent to carry out fitting work when he got injured and got treated at Kenyatta National Hospital whereby one Dr. Odour vide a letter dated January 9, 2015 stated that he required an estimate of Kshs. 200,000 for surgery and hospitalization.
5. The Claimant avers that on January 12, 2015 he submitted the aforementioned letter to the Respondent's Assistant Personnel Manager, Mr Mungai, verbally dismissed him from employment on grounds that he had conspired with Dr. Odour to grant him the letter.

The Respondent Case

6. The Respondent in its Statement of Response dated 18th July 2016 admits that the Claimant was its employee but denies that he was employed in year 2009 and put the Claimant in strict proof and further denied the rest of the Claimant's claim and put him to strict proof.
7. The Respondent avers the Claimant absconded duty without notice on June 8, 2015 and was not terminated as claimed by the Claimant.
8. The Respondent further avers that the Claimant failed to return items issued to him by the Respondent in the course of his employment and that the same was reported to the police.

Claimant

9. The Claimant's case was heard on June 14, 2022, the Claimant testified and relied on his witness statement and list of documents dated June 7, 2016 as his evidence in chief.
10. The Claimant testified that he was terminated from employment by the Respondent after six years of service as a casual labourer and says that no letter or notice was issued to him before the said termination.
11. The Claimant testified that as a casual worker he was informed that he was entitled to leave, however, the company submitted his monthly NHIF and NSSF contribution.
12. On cross examination, the Claimant denied he deserted his employment due to loss of the Respondent's assets and he testified that he was away as he was undergoing treatment for injuries received when undertaking his duties.
13. The Claimant testified that when the Respondent's Assistant Personnel Manager, Mr Mungai terminated his employment the same was done only in the presence of the two of them hence the reason he has no witness.
14. The Claimant testified that it took him one year to bring up his dispute as he was undergoing treatment.

Respondent

15. The respondent's hearing was heard on February 7, 2023 when the Respondent's witness Francis Njenga relied on his witness statement dated October 6, 2022 as his evidence in chief.



16. The RW testified that he was an employee of the Respondent and worked with the Claimant during the time of his employment. He stated that the Claimant was employed on April 11, 2011 on and off and that the Respondent have documents confirming the same but have not been produced in court.
17. RW testified that upon the Claimant's desertion of employment, the Respondent did not call the Claimant to ascertain his whereabouts as he was unreachable.
18. RW further testified that the Claimant was not terminated and the Respondent never received any complaint from the Claimant and/or the labour office until it was served with a demand letter from the Claimant's advocate in January 2016, which was after one year.

Submissions

The court considered the respondent's submissions dated 1st March 2023.

Issues for determination

1. Whether the Claimant was a casual or an employee by dint of Section 37 of the *Employment Act*.
2. Whether the Claimant was unfairly and unlawfully terminated.
3. Whether the Claimant is entitled to the relief sought in the memorandum of claim.

Whether the Claimant was a casual or an employee by dint of Section 37 of the *Employment Act*.

19. Both parties aver that the Claimant was an employee of the Respondent as a casual labourer, however, the Respondent's vide its submissions argue that the employment is not protected under the Section 37 of the *Employment Act*.
20. Section 37 (1) and (4) of the Act provides as follows:
 - a. "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;
 - 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, 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.
 3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
 4. Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act."
21. The RW testified that the Claimant was employed as a casual labourer and that he was engaged by the Respondent on and off, however, the Respondent did not present to the court any evidence or documentations to confirm this.



22. The Claimant on the other hand produced his NSSF member statement dated March 7, 2016 that confirms that the Respondent submitted his contribution continuously from 4-6 month's every year from the year 2009 to 2015.
23. In the case of *Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited* [2015] eKLR, the court opined as follows;
- “With the enactment of the *Employment Act 2007* , considerable attention is paid to provisions of section 37 thereof which provides for conversion of casual service to permanent employment. In particular, subsection 37 (5) (sic) provides that an employee whose contract of service has been converted (on account of a continuous service of three or more months like in the petitioners' case) and who has worked for two or more months from the date of employment as a casual employee, shall be entitled to such terms and conditions of service as he would have been entitled to under the Act had he not initially been employed as a casual employee.”
24. In Civil Appeal No. 20 of 2017, *Nanyuki Water and Sewerage Company Limited vs. Benson Mwiti Ntiritu and 4 Others* (2018), the Court of Appeal, JJA, Waki, Sichale and Kantai considered the issue of casual employment and affirmed the trial Court's decision as follows:-
- “A declaration that Section 37 of the *Employment Act*, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which Section 35(1)(c) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.”
25. In view of the foregoing, I believe the Claimant has proved to the court that he worked continuously for months to end save for 2 or months a year, was paid a monthly wage and the Respondent submitted his NHIF and NSSF contribution and therefore his employment as clearly deemed to be converted pursuant to section 37 of the *Employment Act* into a term contract.

Whether the Claimant was unfairly and unlawfully terminated.

26. The Respondent avers that the Claimant was not terminated and that if he was terminated the same was occasioned by the Claimant's own act of absconding his employment.
27. The court in its decision *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR pronounced as follows:-

“The law as currently designed does not appear to contemplate closure of employment contracts through unilateral abandonment of the parties' obligations under a contract of service. The contract can only be brought to closure as a result of the eventualities contemplated in sections 40 and 41 of the *Employment Act* (redundancy, incompetence, physical incapacity or gross misconduct) or through resignation or mutual agreement with or without notice under sections 35 and 36 of the Act or upon the insolvency of the employer under section 66 and 67 of the Act.

Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR the court observed as follows:-



“..... the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

The Appellant was therefore obligated to invoke the provisions of section 44 to bring the relationship to closure.”

28. The court further inferred to *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR where the court said in cases where an employee is alleged to have deserted duty, it was necessary for the employer to show that it had taken steps to indicate to him that his employment could be terminated for unauthorized absenteeism. It was not open to the Appellant to simply say that the Respondent had abandoned work as a basis of justifying the separation. The court expressed itself in the following way on the issue:-

“ In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”

29. In view of the foregoing, the Respondent failed to prove to the court that it took all reasonable cause to trace the Claimant and grant him a fair disciplinary hearing on grounds of his alleged absentism, therefore their arguments does not hold water.
30. In respect to the Claimant’s argument that he was verbally terminated by the Respondent’s Assistant Personnel Manager, Samuel Mungai on grounds that he conspired with Dr. Odour and his claim that he was injured when conducting his duties has not been challenged evidentially by the Respondent. He said he gave the respondent a hospital bill of kshs 200,000/- and was terminated for that reason. Termination was verbal.
31. Section 45 of the *Employment Act* provides instances of unfair termination as follows:-

45. (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove——
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason——
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.
- (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where –
- (a) the termination is for one of the reasons specified in section 46; or



- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee .
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider -
- a the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - b. the conduct and capability of the employee up to the date of termination;
 - c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
 - d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
 - e. the existence of any previous warning letters issued to the employee.

32. Further, Section 47(5) of the Act stipulates as follows: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

But even where there exists substantive ground(s) to justify a termination, the law obligates the employer to observe certain procedural strictures to ensure the upholding of the broad principles of natural justice in processing the separation between him/her and the affected employee. The employer has to: provide the employee with details of the accusations against the employee; allow the employee an opportunity to respond to the charges; allow the employee to be accompanied by a shop steward or co-employee of his choice during the process; and finally provide the employee with a decision either terminating or saving the contract of service.”

33. The court in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR analysed the provisions of Section 47 (5) of the Act and the burden of proof of the employer and employee as follows:-

“Where the employer fails to do the foregoing, the resultant termination is deemed unlawful. And in law, the burden of justifying the lawfulness of the termination both in terms of whether there was a substantive ground to terminate and whether procedure for release of the employee was adhered to lies with the employer.”

Section 47(5) of the *Employment Act* sometimes presents a challenge regarding how to navigate the aspect of the burden of proof in addressing disputes arising from terminations. It does suggest two burdens: the employee has the burden of proving the unlawfulness of the termination; and the employer has the burden of justifying the termination.



34. The interpretation given to the section by courts is that all the employee needs to do in order to discharge the burden of proof on him/her is to place before the court prima facie evidence suggesting that a termination has occurred and that the said termination lacks a substantive justification and or is procedurally flawed. Once the employee makes a prima facie case, the burden of proof shifts onto the employer to justify the termination.”
35. In view of the foregoing, I opine that the Claimant has brought out the case of unlawful termination for employment by the Respondent who failed to adduce evidence in justification of the said termination and opted to argue that the Claimant absconded his duties without reasons. And even then as earlier observed the respondent failed to prove a case of abscondment.

Whether the Claimant is entitled to the relief sought in the Memorandum of Claim.

35. Having succeeded on issues no. 1 and 2 above the Claimant is entitled to some of the reliefs sought as hereunder.
- a. One month salary in lieu of notice kshs 17,910/-
 - b. Leve for 6 years cannot be justified in any way and the same is declined.
 - c. All other prayers for breach of contract severance pay, exemplary damages and damages for salaries and allowances are all speculation and not supported in any way and all are declined.
 - d. Claimant is however awarded compensation of 6 months' salary for unlawful dismissal considering period he worked for respondent so it works at kshs $17,910 \times 6 = 107,460/-$
 - e. Costs are awarded
 - f. Interest is also awarded at court rates from date of judgment till full payment
 - g. Claimant to be issued certificate of service.
 - h. Total award is Kshs 125,370/-.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 9th 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 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 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

Cause No 1089 of 2016 Judgment Page 9 of 9

