



**Odhiambo v Nanchang Engineering Company Ltd (Employment and Labour Relations Cause 1298 of 2016) [2023] KEELRC 2062 (KLR) (8 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2062 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1298 OF 2016**

**AN MWAURE, J  
AUGUST 8, 2023**

**BETWEEN**

**MESHACK ODHIAMBO ..... CLAIMANT**

**AND**

**NANCHANG ENGINEERING COMPANY LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Vide his Memorandum of Claim dated 28<sup>th</sup> October, 2015 the Claimant herein avers that the termination of the employment by the Respondent was unfair and unlawful. The Claimant seeks the following reliefs:
  - a) Respondent to pay the Claimant one month's salary in lieu of notice, payment in lieu of untaken and unpaid leave, service pay, salary arrears and overtime worked as quantified in paragraph 6 of the Claimant's Memorandum of claim.
  - b) Compensation for unfair termination of employment for 12 months
  - c) Declaration that the Respondent's actions amount to summary dismissal from employment which dismissal was unlawful and unfair.
  - d) Costs and interest.
2. The Respondent filed its Answer to Claim on 16<sup>th</sup> September 2016 wherein it denied the Claimant's allegations.

**The Claimant's case**

3. The Claimant was employed by the Respondent as a security guard from February 2013 until 17<sup>th</sup> January 2015 when his services were terminated. The Claimant avers that he used to work for seven



days a week from 6.00 pm to 6.00am totaling to 4 hours worked daily in overtime and the same was not paid for and that he never took any of his annual leave during this period. The Claimant further avers that the Respondent never remitted his NHIF and NSSF during his period of service.

4. The Claimant further states that on the 17<sup>th</sup> January 2015, one of the Respondent's employee Mr. Lu approached him while on duty and ordered him to go home and on his further inquiries on the position of his employment the said Mr. Lu together with another employee violently attacked him forcing him to run for safety.
5. The Claimant avers that the Respondent's actions to send him away from employment amounted to constructive summary dismissal, which was unlawful and inhumane against the provisions of the Employment Act, the Constitution of Kenya and the tenets of fair labour practices on the following grounds:
  - a. The Claimant was not personally notified of the intention to terminate his services
  - b. No reason was availed to him that informed his termination from employment.
  - c. No hearing took place before the decision to terminate his employment was reached.
6. The Claimant states that arising from his unlawful/ and unfair dismissal on account of false and unsubstantiated reasons, he is entitled to payment of his terminal benefits and compensatory damages as quantified below:
  - i. One month's salary in lieu of notice being at the rate of 432.40/- per day being ..... Kshs 12,972/-
  - ii. Payment in lieu of untaken & unpaid leave for the entire period of service being Kshs 12,972/- ..... 2 years Kshs. 25,944/-
  - iii. Payment in lieu of untaken/ unpaid public holidays for the entire period of service being  $11/30 * Kshs * 2 years * 2 (double daily rate)$  being Kshs.19,025.60/-
  - iv. Overtime for 4 extra hours worked daily for the entire period of service being  $(Kshs 12,972 / 30 * 1/8) Kshs 54 / - * 4 hrs * 30 days * 12 months * 2 years * 1.5 (being 1 1/2 rate of normal working days)$  Kshs 233,280/-
  - v. Salary underpayments
    - (Feb 2013- April 2013)  $379.30 - 290 = 89.3 * 6 days * 4 weeks * 3 months$  Kshs. 6,429.6/-
    - (May 2013- July 2013)  $432.40 - 290 = 142.40 * 6 days * 4 weeks * 3 months$  Kshs. 10,252.8/-
    - (Aug 2013- Dec 2013)  $432.40 - 300 = 132.40 * 6 days * 4 weeks * 5 months$  Kshs. 15,888/-
    - (Jan 2014- Aug 2014)  $432.40 - 310 = 122.40 * 6 days * 4 weeks * 8 months$  ..... Kshs. 23,500.8/-
    - (Sept 2014- Jan 2015)  $432.40 - 320 = 112.40 * 6 days * 4 weeks * 5 months$  ..... Kshs. 13,488/-
  - vi. Compensatory damages for wrong/ unlawful and unfair dismissal being Kshs.12,972/- \* 12 months Kshs. 155,664/-

In support of his claim, the Claimant filed his statement dated 28<sup>th</sup> October 2015.



## **Respondent's case**

7. The Respondent in its Statement of Response dated 16<sup>th</sup> June 2016 admits that the Claimant was its employee but denies that he was employed in February 2013 as the project he was hired for commenced on 1<sup>st</sup> April 2013.
8. The Respondent further denied allegedly beating the Claimant on the date of the said dismissal and stated that the Claimant was not present at work on the said date and therefore he could not have been ordered to go home or be beaten up.
9. The Respondent further denied that the Claimant was summarily dismissed and stated that the Claimant absconded his duties for several days and several occasions. He says that on 15<sup>th</sup> January 2015, the Claimant absconded his duties at the Respondent's premises and started working for Edgemax Solutions Limited, a sub-contractor of the Respondent at the same site. The Respondent stated on the basis of the foregoing, the Claimant is not entitled to any terminal dues and reiterated that the Claimant was paid all days worked, overtime and double pay for public holidays and extra days worked. The Respondent further stated that it remitted the Claimant's NSSF payments and therefore does not owe the Claimant any monies as alleged.

## **Claimant's Evidence**

10. The suit was heard on 22<sup>nd</sup> June 2022, and the Claimant testified and closed his case. The Claimant relied on his witness statement dated 28<sup>th</sup> October 2015 as his evidence in chief.  

The Claimant testified that on 17<sup>th</sup> January 2015 he reported to work at 5.45pm and was called by Mr. Lu whereby he told him to go home and upon informing him it was late, Mr Lu and another employee of the Respondent attacked him prompting him to run away from the premises and proceeded to report the incident to the police where he was issued with the P3 form dated 28<sup>th</sup> January 2015 (attached in his list of documents page 18). The Claimant testified that he was not informed of the reasons why he was chased away and beaten.
11. The Claimant further testified that he never deserted his job as reported by the Respondent at the Labour office, he testified that the Respondent never communicated to him either verbally or in writing explaining the reasons of dismissing him from its premises and/or to trace his whereabouts during the said period the Respondent alleges he absconded from duty.
12. On cross examination, the Claimant testified he was issued a job card everyday but he lost his job card for 28<sup>th</sup> January 2015 as it was in his bag which he left in the Respondent's premises after the attack. Further he did not go back to pick up his belongings as the Respondent's stated he should not go back there. The Claimant further testified he was never paid overtime and that he never received any money via Mpesa from the Respondent as seen in page 22 and 23 of the Respondent's documents.
13. The Claimant further stated that he does not have any documents from NSSF to show that the Respondent's remitted his contributions. Further, he never went for leave and that he never worked for Edgemax Solutions Limited and that he is not aware of such company.
14. The Respondent was unable to proceed with the defence hearing as counsel was unable to secure the Respondent's witness and proceeded to close the case.
15. The court considered the claimant's submissions dated 24<sup>th</sup> February 2023. The respondents submissions also dated 15<sup>th</sup> March 2023 were considered by this honourable court.



## Issues for Determination

16. From the pleadings and the evidence available to the court, the issues which emerge for determination are: -
- a) Whether the Claimant's employment was unfairly terminated
  - b) Whether the Claimant is entitled to reliefs sought.

## Whether the Claimant's employment was unfairly terminated

17. With due consideration of the pleadings, evidence on record and submissions by both parties, the Claimant maintains that he was forcefully chased away and attacked by the Respondent's employees and told never to return to the said premises which actions amounted to his constructive dismissal. The Respondent on the other hand denies attacking and/or chasing away the Claimant from his employment and maintains that the Claimant absconded his duties and took up a job with one of its sub-contractors, Edgemax Solutions Limited and such actions amounted to desertion of duty.
18. The issues for determination are therefore whether the claimant was constructively dismissed or deserted duty without course or was he unlawfully terminated.

In the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the court held that:-

“Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration see also *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).”

Further in the case of *Chiguba Zuma Chiguba v Njuca Consolidated Company Limited* [2018] eKLR, the court held that: –

The Claimant told the Court that his employment was terminated after he reported an attempted theft at his assignment site. In its Reply, the Respondent admits that there had been incidents of theft at the site but states that the Claimant deserted duty on the heels of reassignment of duty. Desertion of duty is a serious offence which may attract summary dismissal. It must however be proved.

The Court was referred to the decision in *James Ashiemi Namayi v Menengai Oil Refineries Ltd* [2016] eKLR where court held that:

“An employer relying on desertion as a ground for termination of employment, must demonstrate attempts made to reach out to the employee, to establish their whereabouts. This is the legal position as I understand it. It is therefore not enough for an employer to simply state that an employee has deserted duty.”

19. In the decision of *William Gituma Gateere v RAA Limited* [2020] eKLR the court stated:-

“... the Respondent did not show any attempts made to reach out to the Claimant with a view to establishing why he had not reported to work. In light of this, the Court rejects



the Respondent's line of defence and thereby adopts the Claimant's testimony that his employment was unlawfully and unfairly terminated."

20. It is not enough therefore for an employer to say an employee has deserted duty and do nothing about it as was the testimony of Respondent witness who in re-examination stated

"we cannot force someone to come back if he walks away."

The employer cannot be an observer or sit on the fence where an employee commits any act of misconduct. The law permits, and requires, an employer to take action and bring the matter to a close.

21. Although the Respondent maintains the Claimant absconded duty, it fails to show the court whether it made any attempts to reach out the Claimant in a bid to establish his whereabouts. Further, the Claimant testified that the Respondent never reached out to him at any time since he left the Respondent's premises on 17<sup>th</sup> January 2023 up until he received the letter from the Labour office notifying him of the Respondent's letter on his alleged desertion of duty. This as he says is after he was beaten and chased away from respondent's premises. A case for abscondment has not been proved.

### **Was the Claimant wrongfully and/or unlawfully and unfairly terminated?**

22. Section 45(1) and (2) of the [Employment Act](#) provides for :-

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.

23. This was crystallized in *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR, in which the Court summarized the aforementioned procedures as follows:

"Section 45 of the [Act](#) makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity."

24. The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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. Also not to be overlooked is the conduct of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41 of the [employment act](#). The previous practice of the



employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee was merely to issue a notice to the employee.

25. Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of his own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.

26. Hon. Lady Justice Maureen Onyango in her decision in Monica Wanza Mbavu v Roofspec & Allied Works Co Ltd [2021] eKLR relied on the above and stated:-

“... it is clear that for termination to be deemed to be fair, it must pass both the substantive test and the procedural test.”

In the instant case, the Claimant testified that the Respondent never communicated to him either verbally or in writing explaining the reasons of dismissing him from its premises and/or attempts to trace his whereabouts during the said period the Respondent alleges he absconded duty. Reference is made to the Respondent's response in which it maintained that the Claimant regularly absconded duty and that on the said date which the Claimant alleged to have been attacked and chased by the Respondent the Claimant was not at work. However, the Respondent failed to prove this and further did not address this in its submissions.

In view of the foregoing, the Respondent failed to prove the claimant absconded from duty and so it unfairly dismissed the Claimant as it failed to prove that it complied with Sections 41 and 45(2) of the Employment Act.

27. The respondent's averments that the claimant absconded from duty is not verified. In the case of Judith Atieno Owour v Sameer Agriculture & Livestock Limited [2020] eKLR the court held

“there being no evidence of either desertion of duty or fair termination by the respondent I thus return a finding of unfair and unlawful termination.”

28. In view of the foregoing the court has found that the claimant's employment was unfairly terminated by the respondent and he deserves compensation.

So judgment is entered against the respondent and claimant is awarded the following remedies.

- a. One month salary in lieu of notice Ksh 8,960/-
- b. Untaken leave or unpaid leave is not proved as claimant never applied for leave during that period and was denied and so this prayer fails.
- c. Overtime is not also prove and is declined.
- d. Unpaid public holidays is not also proved and is disallowed.
- e. Service gratuity seeing there are no documents from NSSF that would confirm money was being deducted and not remitted those also fails.
- f. The claimant deserved compensation for unfair termination as provided in section 49(1)(c) of the employment act. He is awarded 6 months equivalent of his salary at Kshs 8950x6= 53,700. The claimants total awards is Kshs 62,650/-



- g. Costs are also awarded to the claimant plus interest at court rates from date of judgment till full payment.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8<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**

