



REPUBLIC OF KENYA



**Madegwa v Super Bargains & Hardware Limited (Cause 219 of 2017)
[2023] KEELRC 2178 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 219 OF 2017
DN NDERITU, J
SEPTEMBER 21, 2023**

BETWEEN

MICHAEL LUGUSA MADEGWA CLAIMANT

AND

SUPER BARGAINS & HARDWARE LIMITED RESPONDENT

JUDGMENT

i. Introduction

1. The Claimant commenced this cause by way of a Statement of Claim dated 17th May, 2017 filed in court on 22nd May, 2017 through Munene Chege & Co Advocates. As expected the statement of claim was accompanied with a verifying affidavit, Claimant's witness statement, and a list of documents and copies thereof.
2. The Claimant is seeking the following -
 - a. A declaration that the Claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.
 - b. Payment in lieu of notice
 - c. Compensation for unfair termination
 - d. An order compelling the Respondent to settle the outstanding benefits.
 - e. General damages
 - f. Cost of the suit and interest thereof at court rates
 - g. Any other relief that this court may deem fit to grant.



3. On 13th July, 2017 the Respondent entered appearance through Kagwe Kamau & Karanja Co Advocates and filed a response to the memorandum of claim dated 30th June, 2017. In its memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. Alongside the statement in reply to the claim the Respondent filed a witness statement by Ashok Patel, the manager, and a list of documents with copies thereof attached.
5. The Claimant's case came up in court for hearing on 30th May, 2022 when the Claimant (CW1) testified and he closed his case.
6. The defence was heard on 27th July, 2022 when Ashok Patel (RW1) testified and the Respondent's case was closed.
7. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Miss Daye, filed her submissions on 2nd September, 2022 while Counsel for the Respondent, Mr. Omiti, filed his submissions on 7th November, 2022.

ii. The Claimant's Case

8. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summed up as hereunder.
9. In his memorandum of claim the Claimant pleads that he was at all material times engaged by the Respondent as a loader on casual basis from 2005 to 4th November, 2016 when he was allegedly unfairly and unlawfully dismissed.
10. The Claimant alleges and pleads in paragraph 5 of the memorandum of claim that he was un-procedurally dismissed "for the reason that the claimant was being transferred by the Respondent to another company under different management".
11. Further, the Claimant pleads that he was not paid his lawful dues or benefits upon dismissal. He pleads that he was earning a gross monthly salary of Kshs.6,000/= from 2005 to around 2009 when the same was raised to Kshs.6,500/=.
12. The Claimant has particularized the alleged underpayments, service gratuity (sic!), and the other claims summed up in the prayers set out above.
13. In his testimony in court the Claimant adopted his filed witness statement on record and produced the documents filed in court as exhibits 1, 2, and 3.
14. However, in cross-examination, in complete departure from his pleadings, the Claimant alleged that in July, 2016 he was injured while on duty and he had to seek medical attention as a result of which he claimed not to have been in a position to attend to work. Although he did not avail any medical records in court, the Claimant alleged that when he reported back to work in November, 2016 he was informed that his services had been terminated.
15. He admitted that between 2007 and 2009 his salary was Kshs.6,500/= and that his salary was thereafter raised to Kshs.10,000/=. Further, he admitted that as at 4th November, 2016 when he left employment with the Respondent his salary was Kshs.15,000/=.
16. He stated that he has not landed another job since leaving employment with the Respondent. He admitted that the Respondent deducted and paid statutory dues to NHIF and NSSF.



17. It is important to note that in court the Claimant alleged that he was terminated after he stayed away from work from July to November, 2016 due to an injury allegedly sustained at work. In his memorandum of claim the Claimant pleaded that he lost his job after he was allegedly transferred to another company under a different management. Bizarrely, no medical records were availed by the Claimant in support of his alleged injuries and equally no documents were availed for the alleged transfer to a new company under a different management from the Respondent. This departure and the import thereof shall be dealt with in the succeeding parts of this judgment.
18. It is on the basis of the foregoing that the Claimant prayed that his cause be allowed as prayed in the statement of claim. The submissions by his counsel shall be considered in the determination of the issues in a latter part of this judgment.

iii. The Respondent's Case

19. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, the manager, and the written submissions by its Counsel, as summarized hereunder.
20. In the response to the claim the Respondent pleaded that the Claimant was not dismissed or terminated in any way but rather he deserted duty from 4th November, 2016. It is pleaded that the Claimant unfairly, un-procedurally, and unlawfully deserted duty thereby terminating his own employment without notice.
21. The Respondent denied the underpayments claimed by the Claimant pleading that the Claimant was at all material times paid in accordance with minimum regulated wages as provided for by the Government from time to time. The claim for service gratuity is denied and the Respondent states that deductions made were remitted to NSSF and as such this claim is precluded under Section 35(6)(d) of the *Employment Act* (the Act).
22. The Respondent pleaded that it only owes the Claimant a sum of Kshs.1,846/= being salary for the four days worked in November, 2016 before the Claimant absconded and later deserted duty. All the other claims are denied in toto.
23. In his testimony in court RW1 relied on his statement on record and produced all the filed documents as exhibits. The said documents include various gazette notices and guidelines on regulation of wages as issued from time to time as evidenced in the employment records of the Claimant produced by the Respondent.
24. He testified that by 2016 the Claimant was earning a gross salary of Kshs.16,000/=. Further, he stated that at no point was the Claimant transferred or proposed to be transferred to any other place and or company. He stated that the Claimant was not sent to Kitale in July, 2016 and or that he was injured on duty as alleged by the Claimant in his testimony. He stated that the Claimant absconded duty in early November, 2016 never to return to work.
25. In cross-examination he stated that the Claimant's monthly salary in 2011 was Kshs.10,000/=. He stated that when the Claimant failed to show up for work in early November, 2016 the Respondent did not pursue him as he was a casual and, in any event, he was owed no dues by the Respondent. He stated that the Respondent only owes the Claimant a sum of Kshs.1,846/= for days worked in November, 2016 which the Respondent has always been ready to settle but the Claimant has failed and or refused to pick. He testified that deductions made from the Claimant's pay were submitted to NHIF and NSSF. He stated that no gratuity or service pay is due to the Claimant. He stated that house



allowance was duly paid to the Claimant during the entire period of employment and that all payments made to the Claimant were based on the applicable Government guidelines as issued from time to time.

26. The submissions by counsel for the Respondent shall be considered alongside those of the Claimant's counsel in the following parts of this judgment.

iv. Issues for Determination

27. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. I have also seen a list of agreed issues filed in court on 18th January, 2018 executed by counsel for both parties. From the above the court identifies the following issues for determination –
- a. What was the nature and terms of the employment relationship between the Claimant and the Respondent?
 - b. Was the Claimant dismissed or terminated by the Respondent or did he abscond and subsequently desert duty?
 - c. If the Claimant was dismissed or terminated was the same wrongful, unfair, and unlawful?
 - d. If (b) and (c) above are in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - e. Who meets the costs in this cause?

v. Employment

28. The Claimant pleaded and testified that he was engaged by the Respondent in 2005 as a loader on casual basis and remained as such until 4th November, 2016 when he was allegedly unfairly and unlawfully dismissed. He alleged that he started on a monthly pay of Kshs.6,000/= which had been raised to Kshs.6,500/= as at the time of dismissal.
29. On the other hand, while the Respondent admitted that the Claimant was its employee as a loader on casual basis, it denied that he was engaged from 2005 but admitted that he left employment at the beginning of November, 2016. Further, and this was admitted by the Claimant in cross-examination, the Respondent maintained that the last gross pay for the Claimant was Kshs.16,000/= and it produced a muster roll to that effect through RW1. The said muster roll which runs from January, 2011 to October, 2016 indicates that between the said two dates the gross monthly pay for the Claimant ranged from Kshs7,500/= to Kshs.16,000/=.
30. Section 37(1) of the *Act* provides as follows –
- 37.
- (1) 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; or
 - (b) performs work which can not 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, the 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.
- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (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.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 88 of this Act shall apply.
31. In view of the foregoing provisions of the law, it is the finding and holding of this court that the Claimant was on month to month employment as evidenced by the periodic and regular payment of salary and that his last gross salary was Kshs.16,000/= as per the muster roll produced by the Respondent which has not been disputed or dislodged by the Claimant in any way. RW1 admitted that he supervised the Claimant from 2008 to 2016 and there is no way in law that the Claimant should have remained on casual employment for that entire period. In any event, as stated above, the law allows this court to interpret and deem such a contract of service, after the first month, to be a month to month contract of service. It is so held.

vi. Dismissal or Desertion

32. The parties disagree on the circumstances leading to and culminating in the Claimant ceasing to be in the employment of the Respondent. On the one hand, the Claimant pleaded in his memorandum of claim that he was terminated after the Respondent purportedly transferred him to a different company under a different management. He pleaded in paragraph 5 of the memorandum of claim that –
- “That the claimant was unprocedurally dismissed by the Respondent for the reason that the claimant was being transferred by the Respondent to another company under different management.”
33. However, the Claimant was too economical on the details and particulars of the alleged dismissal or termination leaving the court with more questions than answers. How was the Claimant informed of the alleged transfer? Was he issued with a letter or notice? What is the name and location of that company to which he was to be transferred? What were the terms of the alleged new engagement? Did he reject the transfer as a result of which he was dismissed? Exactly how was he terminated or dismissed if at all?
34. This issue is further compounded by what the Claimant stated in court. In complete departure from what he pleaded he testified that in July, 2016 he was injured while working for the Respondent in



- Kitale and as such he left employment to seek medical assistance and that he returned to work at the beginning of November, 2016 when he was allegedly informed that his services were no longer required. He had no medical records of the injury or treatment and no document to confirm that he was injured as alleged and that he sought sick leave to stay away from work on medication.
35. On the other hand, the Respondent's case as pleaded and presented in court through RW1 is that the Claimant deserted duty at the beginning of November, 2016 never to return. To buttress that position RW1 produced the muster roll confirming that indeed the Claimant was at work in July to October, 2016 and as such there was no time when the Claimant was out of work due to injury as alleged.
 36. However, RW1 admitted that no efforts were made to contact the Claimant as according to him the Claimant was a casual who had opted to terminate his services with the Respondent. This aspect shall be revisited in a succeeding part of this judgment.
 37. It is the holding and determination of this court that the Claimant unlawfully and without notice absconded duty as from early November, 2016 never to return. Clearly, the Claimant never intended to return and as time went by the absconding became desertion and more so after issuing a demand letter wherein he sought for terminal dues.
 38. A plethora of decisions from this court (ELRC) has to a large extent settled the law on what constitutes substantive and procedural fairness – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
 39. The bottom-line of fairness is that an employer must have a legal reason and adopt the proper legal procedure before terminating or dismissing an employee.
 40. The law in its wisdom recognizes that employment contracts like all other contracts are organic and shall come to an end at some point in time. There is a variety of reasons that could terminate a contract of employment and the Act provides for many such reasons. Employment is personal in nature and hence death of an employee brings the relationship to a natural end. Sections 40 (redundancy), 43, 44, 45, and 46 of the Act provide for reasons and circumstances that may form good grounds for termination or dismissal. Similarly, Sections 35, 36, 40, and 41 of the Act provide for germane pointers towards what constitutes procedural fairness.
 41. It is in the context of the foregoing that the facts and evidence in this cause shall be weighed to determine if the dismissal of the Claimant by the Respondent was substantially and procedurally fair, if at all.
 42. This court has already found and held that the Claimant deserted duty. That being so, the Respondent had a lawful and substantive ground upon which to found a dismissal under Section 44(4)(a) of the Act.
 43. While the Respondent readily admits that it made no efforts in following up with the Claimant to establish why he deserted duty it did not invite or subject him to a disciplinary process to formalize the separation. Even if the Respondent did not know the whereabouts of the Claimant after he deserted duty, which has not been so stated or alleged, an opportunity for inviting him and subjecting him to disciplinary process presented itself when a demand letter was addressed to the Respondent by the Claimant's counsel dated 7th November, 2016.
 44. In the said letter of demand the Claimant alleged inter alia that he had been unfairly and unlawfully dismissed. Of course, this court has already found that that was not the case. However, the Respondent ought to have taken up the matter from there and then by inviting the Claimant for a disciplinary process to formalize the separation as the letter was clear and categorical that the Claimant was not



- reporting or coming back to Respondent's employment. If the Claimant failed and or refused to submit to such process, fine, the Respondent had discharged its part and the court should have noted so accordingly. The Respondent has not denied that it received the said letter of demand. It appears that the Respondent just ignored the said letter as no response to the same was availed during the hearing.
45. The question then becomes – At what point did the Claimant cease to be an employee of the Respondent and as such not subject to disciplinary process of the Respondent? In regard to the letter of demand dated 7th November, 2016 it is pleaded by the Claimant that the same was served upon the Respondent. This is not denied by the Respondent in its response to the Claim. The Respondent's case is that the Claimant failed to report to work and therefore deserted duty from 4th November, 2016. That being the scenario it is the finding and holding of this court that the period from 4th to 7th November, 2016 was not long enough as to have caused the Respondent to take disciplinary action against the Claimant. It is vide the letter of demand that the Claimant signaled his intention of not returning to work and hence ceased to be an employee of the Respondent and no disciplinary action would have been undertaken against him by the Respondent from that point onwards.
 46. The court has said enough to demonstrate and confirm that it is the Claimant who terminated his employment through absconding duty and as such the Respondent had no chance of subjecting him to disciplinary process. The Respondent has demonstrated and proved that the Claimant deserted duty. The Claimant has not demonstrated that he was dismissed or terminated by the Respondent as alleged.
 47. Conversely, the Respondent did not take any procedural steps to formalize the termination. The Respondent was legally bound to establish his whereabouts when he absconded duty on or about 3rd November, 2016 and subject the Claimant to due process once it confirmed that indeed he was not coming back to work. It is the Respondent who had employed the Claimant and not the vice versa. As stated elsewhere in this judgment had the Respondent invited the Claimant for a disciplinary hearing and the Claimant failed and or refused to be subjected to such procedural fairness the Respondent should be deemed to have discharged its burden.
 48. Nonetheless, it is the Claimant who caused the termination by absconding duty and later on deserting when he signaled his intention of not returning to work through the letter of demand by his lawyers dated 7th November, 2016. In the said letter the Claimant did not indicate or express his desire to re-engage or to be reinstated and as such he had already made up his mind to leave employment of the Respondent and indeed he had left.

vii. Reliefs

49. Having held that the Claimant absconded and later deserted duty and that the Respondent failed, refused, and or neglected to subject him to disciplinary process this court shall now consider each of the reliefs sought as set out in the introductory part of this judgment.
50. Prayer (a) is for a declaration that the dismissal of the Claimant by the Respondent was unfair, unlawful, unjust, and discriminative. The court has found that the Claimant was not dismissed but he terminated the employment by deserting duty. This prayer fails in the circumstances.
51. Prayer (b) is for payment in lieu in notice. This prayer is denied as it is the Claimant who deserted duty and the Respondent had no obligation or even an opportunity to issue a notice in the circumstances.
52. Prayer (c) is for compensation for unfair and unlawful termination. The court has found that the Claimant was not terminated but he deserted duty and thereafter terminated the relationship. However, the Respondent took no action in formalizing the ending or termination of the relationship as the employer. There is no evidence of any attempts by the Respondent to contact or trace the



- Claimant once he deserted duty. The argument advanced by the Respondent is that the Claimant was a casual and as such it was under no obligation to contact the Claimant once he absconded and subsequently deserted duty. Of course, this court has found and held that the Claimant was a month to month employee.
53. Each cause shall be decided on its own merits and peculiarities. Counsel for the Claimant has submitted that the Claimant should be awarded 12 months gross salary in compensation. However, this assertion is not supported by evidence or any cited authorities. The court has found that the Claimant deserted duty. The mistake that the Respondent made is that no efforts were made to contact or trace the Claimant so as to subject him to procedural disciplinary process and formalize the termination which was initiated by the Claimant.
 54. For all the foregoing reasons and doing the best that the court can do in the circumstances, the Claimant is awarded two months pay as compensation for the un-procedural termination of the relationship. The award is calculated as follows –Kshs.16,000/=*2= Kshs.32,000/=.
 55. Prayer (d) is for an order compelling the Respondent to pay all the benefits as pleaded. As far as the court can tell the claimed benefits are salary underpayments, service gratuity (sic), and payment in lieu of notice. The court has already found in the foregoing paragraphs that the Claimant is not entitled to any notice pay as he absconded and later on deserted duty.
 56. On underpayments the Claimant is seeking a total of Kshs.242,956.86. The said claim is based on alleged underpayments of salary for the period from May, 2010 to May, 2016. It is important to note that this cause was filed in May, 2017 and based on Section 90 of the Act the court can only make an award on claims that are within three years preceding the filing of the cause as all those beyond that period are time-barred. Three years counting backwards from May, 2017 goes back to April, 2014. Therefore, any claim that goes backwards beyond April, 2014 shall not be considered. For the period that merit consideration the Claimant has pleaded for Kshs.46,533.27 for May, 2014 to April, 2015; Kshs.61,476.60 for the period from May, 2015 to April, 2016; and Kshs.30,738.30 for the period from May, 2016 to October, 2016.
 57. In support of the claims the Claimant has alluded to various legal notices but he has not filed copies thereof notwithstanding that the court directed his counsel to file the same alongside the written submissions.
 58. On the other hand, the Respondent availed various legal notices in support of its assertion that the Claimant was all along paid salary that was commensurate with Government wages regulations and guidelines. The records availed which were admitted in evidence show that as at April, 2014 the Claimant was earning a gross salary of Kshs.12,077/=. This is higher than the then recommended minimum wage of Kshs.10,107.10. By May, 2015 the Claimant was earning Kshs.16,000/= against the minimum recommended wage of Kshs.10,107.10. By May, 2015 the Claimant was earning Kshs.16,000/= per month against the recommended minimum wage of Kshs.10,496.90.
 59. From the foregoing analysis, the court finds and holds that the Claimant was always paid wages above the recommended minimum. It was incumbent upon the Claimant to demonstrate and prove that he was indeed underpaid. He failed in this task and hence this claim for underpayments is hereby dismissed in its entirety.
 60. The other item in the claim is what has been termed by the Claimant as “service gratuity”. This is a rather confusing request. Service pay is usually paid where an employer has not provided for a pension scheme and or program. It is calculated as a percentage of the monthly salary for each completed year. Gratuity on the other hand is a gratuitous payment made by an employer to an employee as way of



thanking an employee for a job well done and good or satisfactory services rendered. As the word implies it is either agreed as a term of the contract or paid at the discretion of the employer. It is for the foregoing reason that the prayer for “service gratuity” is confusing – See *Pathfinder International Kenya Limited V Stephen Ndegwa Mwangi* (2019) eKLR, *Bamburi Cement LTD V Farid Aboud Mobamed* (2016) eKLR, and *H. Young & Company EA Limited V Javan Were Mbago* (2016) eKLR

61. The records produced by the Respondent including the muster roll indicate that deductions for NSSF were made from the Claimant’s pay. No allegations were made that the said deductions were not remitted and hence the Claimant ought to claim the same therefrom. In any event, the Claimant admitted that the said deductions were remitted as per the law.
62. As for gratuity RW1 was categorical in his evidence that no gratuity was payable to the Claimant. It was not a term of the contract and the Respondent is not willing to pay any.
63. For all the foregoing reasons, the claim for service pay or gratuity is denied.
64. However, it is admitted that the Claimant was on duty for the period from 1st to 3rd, November and the salary arrears of Kshs.1,846/= are admitted and as such the same is awarded.
65. Prayer (e) is for general damages. The court has perused the pleadings, evidence adduced by the claimant both oral and documentary, and submissions by counsel and there is nothing adduced in support of this claim. What is the basis or foundation of this claim? What damages beyond what is sought in the various subheads did the Claimant suffer? This court has stated on numerous occasions that the only damage that an employee who has been unfairly or unlawfully terminated suffers is what he would have earned had he continued working. Section 49 of the Act provides for such compensation and the court has considered that aspect in the foregoing paragraphs of this judgment. Unless there is specific damage pleaded and proved based on such aspects as discrimination, sexual harassment, violation of other constitutional rights or obligations this court has no basis or grounds upon which to found an award for general or special damages beyond the statutory compensation under the Act. For these reasons the claim for general damages is denied.

viii. Costs

66. The claimant is awarded costs of this cause.

ix. Disposal

67. In final disposal of this cause, this court issues the following orders: -
 - a) That a declaration be and is hereby issued that the Claimant was an employee of the respondent on a contract of service running from month to month.
 - (b) A declaration be and is hereby issued that the Claimant absconded and thereafter deserted duty effectively terminating his contract of employment.
 - (c) However, the Respondent failed to subject the Claimant to due process
 - (d) The Claimant is awarded a total of Kshs.33,846/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
 - i. Compensation for termination without due process.....Kshs.32,000/
=
 - ii. Salary arrearsKshs. 1,846/=



Total.....Kshs.33,846/=

- (e) All the other claims are denied.
- (f) The Claimant is awarded costs of this cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 21ST DAY OF SEPTEMBER, 2023.

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DAVID NDERITU
JUDGE

