



**Odhiambo v Siri Gurdwara Ramgarhia Railway (Cause 1043 of 2018)
[2023] KEELRC 2587 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1043 OF 2018
JK GAKERI, J
OCTOBER 24, 2023**

BETWEEN

JUSTUS ATSIENO ODHIAMBO CLAIMANT

AND

SIRI GURDWARA RAMGARHIA RAILWAY RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 22nd June, 2018 alleging unfair dismissal from employment and non-payment of terminal dues and prays for;
 - i. A declaration that termination of employment by the Respondent was unfair and illegal.
 - ii. An order for the Respondent to pay the Claimant dues and compensation of Kshs.1,401,605.00.
 - iii. Costs of this suit plus interest.
 - iv. Certificate of service.
2. The Claimant's case is that he was employed by the Respondent on 24th September, 1998, as a cleaner but rose to a cook and purchaser of groceries from the market and served the Respondent diligently for 19 years at a gross salary of Kshs.13,861/= per month.
3. That he used to work from 6.00 am to 4.00 pm.
4. That while on leave in 2019, his reliever, Mr. Francis Katele bought groceries and it was discovered that he obtained them at a cheaper price than the Claimant and the inference of price exaggeration was made.
5. That the Secretary summoned the Claimant on 1st February, 2018 and his employment was terminated on the same day.



6. According to the Claimant, the Respondent had no valid reason to terminate his employment as the allegations were unsubstantiated and no notice to show cause was issued or investigations conducted.

Respondent's Case

7. In its response to the claim filed on 25th October, 2018, the Respondent avers that the Claimant was a general worker of the Respondent and he used to report at 7 am and stay in one of the rooms until sent to the market (Marikiti) and the Quantities and prices would be counter-checked at the gate.
8. The Respondent denies that the Claimant worked over-time as he exited the work place at 3.00 pm.
9. That the Claimant was accorded an opportunity to be heard but refused to attend and was subsequently terminated from employment.
10. That the Claimant declined to collect the salary in lieu of notice and the same was sent to the Labour Officer.
11. In its Counter-claim, the Respondent avers that owing to the illegal acts of the Claimant, it suffered a loss of Kshs.2,345,880.00 which it was claiming from the Claimant.
12. The Respondent prays for;
 - i. Dismissal of Claimant's case.
 - ii. Kshs.2,345,880.00 as damages for conversion.
 - iii. Interest on (ii) above.
 - iv. Costs of the claim and counter-claim.

Claimant's Evidence

13. The Claimant testified that he was employed on 24th September, 1998 as a cleaner and later he would assist in the cooking at Land Mawe before another cook was recruited. He admitted that the payslip he provided stated that he was a cleaner and had no evidence of his duties.
14. That he used to report at 6 am and leave at 4 pm daily, proceeded on leave annually and had a rest day on Tuesday.
15. The witness acknowledged receipt of the termination letter.
16. He admitted that he had no evidence to show that he worked overtime.
17. On re-examination, the Claimant testified that he was paid overtime for Saturdays.

Respondent's Evidence

18. RWI, Mr. Musau Nzioka confirmed on cross-examination that he and the Claimant were colleagues and the Claimant's sole duty was to purchase groceries and he ordinarily reported at 7 am and leave at 2 pm or 3 pm.
19. RWI testified that he was the security guard and confirmed purchases by the Claimant by recording the quantities bought and the prices.
20. That the Claimant used to exaggerate the cost of the items bought and was dismissed after an investigation. The witness, however, admitted that he had no evidence of the investigation or the exaggeration of prices.



21. The witness testified that the Claimant worked for 19 years and had no record of misconduct.
22. Although he testified that the Claimant was accorded an opportunity to be heard, he admitted that he had no evidence of the process.
23. He confirmed that he had no evidence of the loss alleged by the Respondent.
24. On re-examination, RWI testified that the Claimant did not work overtime and had absconded duty.

Claimant's submissions

25. Counsel addressed issues touching on whether termination of the Claimant was justified, procedure adopted, reliefs and the Respondent's Counter-claim.
26. On justification, reference was made to Sections 43 and 45(2) of the *Employment Act* and the sentiments of Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
27. Counsel submitted that there was no evidence to validate the allegation made against the Claimant and the Respondent had thus failed to prove that it had a valid reason to terminate the Claimant's employment.
28. The decision in *Joseph Sitati Nato v Kenya Ports Authority* (2010) eKLR was also relied upon.
29. As regards due process, counsel cited Section 41 of the *Employment Act* to urge that the Claimant was not accorded a hearing.
30. Reliance was also made on the holding of Ndolo J in *Donald Odeke v Fidelity Security Ltd* (2012) eKLR to urge that the termination was procedurally unfair.
31. On the prayers sought, counsel submitted that the Claimant was entitled to all the reliefs claimed as termination of employment was unfair.
32. Finally on the Counter-claim, counsel submitted that it should be dismissed as it was not supported by any evidence as to how the Claimant stole the sum of Kshs.2,345,880.00.

Respondent's submissions

33. As to whether termination of the Claimant's employment was justified, counsel cited Section 44 of the *Employment Act* and the sentiments of Rika J in *Thomas Sila Nzivo v Bamburi Cement Ltd* (2014) eKLR to urge that the Respondent had reasonable and sufficient grounds to suspect that the Claimant was stealing from it and invited the court to find the evidence of RWI as corroborative.
34. That the Claimant misunderstood the contents of the letter dated 1st February, 2018 and left employment.
35. According to the counsel, the letter availed by the Claimant as a termination letter lacks authenticity as it is addressed to the Respondent and was not signed by the Respondent but the Claimant and the author is unknown.
36. Counsel submitted that the Claimant's employment was not terminated by the Respondent.
37. Although counsel urged that the Claimant refused to appear before the committee, he cites no letter of invitation or minutes showing that the Claimant did not appear or the committee's resolutions and relies on Section 44(4)(a) of the *Employment Act* to urge that the Claimant absented himself from duty and cites the decision in *Rodgers Titus Wasike v General Motors East Africa Ltd* (2020) eKLR as well as



Thomas Dzombo Kirunga v Kyrstalline Salt Ltd (2020) where the Claimants had absented themselves from work for 8 and 9 days respectively without notice.

38. On overtime, counsel cited Rule 5 of the *Regulation of Wages (General)* on working hours and argued that RWI contradicted the Claimant's evidence on reporting and exit times and did not work overtime.

Determination

39. The issues for determination are;
- i. Whether the Claimant deserted employment or was unlawfully terminated by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
40. As to whether the Claimant deserted or was unfairly terminated from employment by the Respondent, the starting point is a definition of desertion.
41. In the often cited South African decision in *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court stated;
- “... desertion is distinguishable from absence without leave, in that the 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.”
42. Similarly, *Black's Law Dictionary*, 10th Edition defines desertion as;
- “The wilful and unjustified abandonment of a person's duties or obligations.”
43. As held by Ndolo J. in *Ronald Nyambu Daudi v Tornado Carriers Ltd* (2019) eKLR;
- “Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal.”
44. Did the Claimant desert duty?
45. From the pleadings, it is evident that the Respondent did not plead that the Claimant deserted duty.
46. However, on re-examination, RWI testified that the Claimant absconded duty and counsel for the Respondent submitted as much and even cited two decisions to reinforce the submission but had no supportive evidence.
47. The emerging jurisprudence on desertion is that an employer relying on desertion is obligated to demonstrate the efforts it has expended to contact the employee and put him or her on notice that termination of employment was being considered on account of the desertion.
48. [See *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR, *Simon Mbithi Mbane v Inter Security Services Ltd* (2018) eKLR, *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR, *Ronald Nyambu Daudi v Tornado Carriers Ltd* (Supra)].
49. In the instant case, the Respondent has not produced evidence to demonstrate the steps it took to contact the Claimant to resume duty.
50. There is no evidence of a notice to show cause or attempts to contact him.



51. RWT's oral testimony that the Claimant refused to appear for the hearing as argued by counsel cannot avail the Respondent as it adduced no evidence of the invitation or agenda of the meeting.
52. Equally, the Respondent did not avail minutes of the committee as evidence that the committee had been constituted, sat on the appointed date but the Claimant failed to show up.
53. From the foregoing, it is evident that the Respondent has failed to evidentiary demonstrate that the Claimant deserted duty.
54. As held by Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (Supra), for a termination of employment to pass muster, it must be shown that the employer had a substantive justification for the termination and employed a fair procedure as ordained by the provisions of Section 45(2) and 41 of the *Employment Act*, 2007.
55. Paragraph 5 of the Response to Claim states as follows;

“. . . the Respondent avers that the illegal acts of the Claimant as succinctly described in paragraph 4 of the Statement of Claim amounted to gross misconduct, allowing the Respondent to terminate the employment of the Claimant.”
56. Intriguingly, the Respondent's witness statement makes no reference on how the Claimant and the Respondent separated. The statement is incomplete.
57. From the statement of claim and the response, it is clear that the Respondent had an issue with the Claimant regarding exaggeration of prices.
58. The Claimant availed a letter of termination dated 1st February, 2018 addressed “to whom it may concern” under the Reference Termination of Duty (Justus Odhiambo).
59. The letter is not under the Respondent's letterhead and the signatory has no designation.
60. Puzzlingly, the Respondent did not contest the letter or disown it.
61. RWT'S evidence makes no reference to the letter produced by the Claimant.
62. In the absence of controverting evidence, it is the finding of the court that the letter on record dated 1st February, 2018 was a termination letter and the Claimant treated it as such.
63. The alleged reasons for termination are cases of malpractices (Vegetable Account), lack specificity on what they entailed and the Respondent's witnesses evidence was silent on the alleged malpractices.
64. From the evidence on record, it is the finding of the court that the Respondent has failed to demonstrate that it had a valid and fair reason to terminate the Claimant's employment.
65. As regards the procedure adopted by the Respondent, it is clear that the Respondent did not comply with the requirements of Section 41 of the *Employment Act*, 2007 whose provisions are mandatory as held in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR.
66. The Respondent did not issue a notice to show cause to the Claimant or invite him for a hearing and none took place.
67. The Respondent's averment and evidence by its witness that the Claimant was accorded the opportunity to defend himself but failed to appear is unsupported by evidence and cannot avail the Respondent for reasons adverted to elsewhere in this judgement.



68. Invitation to a hearing would have informed the Claimant of his right to be accompanied by another employee of his choice and would have been heard.
69. In the end, it is the finding of the court that the Respondent has failed to prove that it conducted termination of the Claimant's employment in accordance with a fair procedure.
70. In sum, the Respondent has failed to demonstrate that termination of the Claimant's employment was unfair.

Reliefs

71. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

Declaration

72. Having found that termination of the Claimant's employment by the Respondent was unfair, a declaration to that effect is merited.

Pay in lieu of notice

73. The Respondent adduced no evidence to show that it accorded the Claimant the requisite notice, or paid in lieu of notice in accordance with Section 36 of the Employment Act, 2007.

The Claimant is awarded the sum of Kshs.13,861/= pay salary in lieu of notice.

Unpaid overtime

74. The Claimant prays for Kshs.1,221,412.50 as unpaid overtime at 2 hours per day for 19 years, 7 months.
75. The amount prayed for is assessed on the fundamental assumption that for 19 years, 7 months, the Claimant did not miss work on all days he was expected to report and his schedule remained the same for the entire duration which appears not only idealistic but unrealistic.
76. In his Memorandum of Claim, the Claimant made no averment on his reporting or exit from work but in his statement, he indicated that he used to report at 6.00 am and leave at 4.00 pm and repeated the same on cross-examination.
77. However, RWI, who was the security guard at the gate confirmed on cross-examination that the Claimant reported at 7.00 am and left either at 2.00 pm or 3.00 pm and his role was purchase of groceries at the Marikiti market which RWI would verify and whenever the Claimant proceeded on leave, Mr. Francis Kalele bought the groceries.
78. RWI, who appeared honest confirmed that he found the Claimant in employment in 2001 when he joined the Respondent and the Claimant had worked there for 19 years.
79. On re-examination, RWI testified that the Claimant did not work overtime.
80. Since RWI was the Claimant's colleague at the work place and disputed the Claimant's reporting exit times as well as his duties, it behoved the Claimant to adduce more credible evidence to show that he indeed worked overtime consistent with the mantra that he who alleges must prove. Notably, on re-examination, the Claimant testified that the Respondent was paying him overtime for Saturdays only yet the amount claimed is for 30 days a month having confirmed that Tuesday was his off-day and worked half-day on Sunday.



81. The Claimant tendered no additional evidence to establish the claim and in the circumstances it is the finding of the court that the Claimant has failed to demonstrate that he worked overtime and was thus entitled to the sum of Kshs.1,221,412.50.

The prayer is declined.

Compensation

82. Having found that termination of the Claimant's employment as unfair for non-compliance with the provisions of the Employment Act, 2007, the Claimant is entitled to compensation under Section 49(1) (c) of the Employment Act, 2007.

83. In determining the quantum of compensation, the court has taken into account the following;

- i. The Claimant was an employee of the Respondent for more than 19 years which is a long time and there is no recorded misconduct or disciplinary issue.
- ii. The Claimant did not express his wish to continue in the Respondent's employment and did not appeal the Respondent's decision.
- iii. The Claimant contributed to the termination of employment, though minimally.

84. In the circumstances, the court is satisfied that the equivalent of 10 months salary is fair.

Certificate of service

85. The Claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act, 2007.

Counter-claim

86. In its Counter-claim, the Respondent prays for Kshs.2,345,880.00 from the Claimant on the allegation that the Claimant stole the cash which came into his possession as an employee hence a claim for refund.

87. The Respondent adduced no evidence on when the amount came into the Claimant's possession and whether it had demanded the same. Equally, the Respondent tendered no evidence as to how the sum was arrived at.

88. Significantly, the statement by RWI makes no reference to the Claimant having received any monies from the Respondent and failed to account for it.

89. Since the Respondent was not engaged in a commercial activity or business where money changed hands, it is unclear as to how the Claimant came into possession of the humongous sum of money as there is no allegation that he was given the cash and did not render the service for which it was given or supply the goods paid for.

90. In the court's view, the Counter-claim was an afterthought as the Respondent adduced no evidence that it gave the Claimant the sum claimed or he received it on behalf of the Respondent.

91. In the circumstances, the counter claim is unproven and it is accordingly dismissed.

92. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;

- a. Declaration that termination of the Claimant's employment by the Respondent was unfair.
- b. One month's salary in lieu of notice Kshs.13,861.00.
- c. Equivalent of 10 months' salary, Kshs.138,610.00.



Total Kshs.152,471.00

- d. Costs of this suit with interest at court rates from date of judgment till payment in full.
- e. Certificate of service.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 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

