



REPUBLIC OF KENYA



KENYA LAW
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**Muema v Kenbro Industries Limited (Cause 2327 of 2023)
[2023] KEELRC 2543 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2327 OF 2023
L NDOLO, J
OCTOBER 19, 2023**

BETWEEN

ONESMUS MUTETI MUEMA CLAIMANT

AND

KENBRO INDUSTRIES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant, Onesmus Muteti Muema, proceeds against the Respondent, Kenbro Industries Limited, seeking relief for unlawful and unfair dismissal.
2. The claim is contained in a Memorandum of Claim dated and filed in court on 22nd November 2017. The Respondent filed a Reply dated 24th January 2018.
3. The matter went to full trial, where the Claimant testified on his own
4. The Respondent called its Director, Sandeep Varia. Both parties also filed written submissions.

The Claimant's Case

5. The Claimant states that he was employed by the Respondent, as a Machine Operator, from 12th April 2004 until 5th September 2015, when he was dismissed. He pleads his monthly salary as Kshs. 24,677.
6. The Claimant avers that on 5th September 2015, he reported to work as usual. He claims that at around midday, he and his colleagues were summoned by the Human Resource Manager, one Ms. Martha to appear at the General Manager's office. The General Manager is said to have informed the Claimant and his colleagues that there had been rampart machine breakdowns. The General Manager is alleged to have given a mandatory directive that all repairs would be borne by the Machine Operators.



7. The Claimant and his colleagues protested the decision by the General Manager, on the ground that the breakdown of machines was caused by other factors and not negligence on the part of the Machine Operators. The Claimant states that pursuant to the complaints by him and his colleagues, the General Manager informed them that their services were no longer required and they stood dismissed.
8. The Claimant lays a claim of unlawful and unfair dismissal and therefore claims the following:
 - a. One month's salary in lieu of notice.....Kshs. 24,677
 - b. Unpaid/untaken leave for 11 years.....190,012
 - c. Service/gratuity for 11 years.....135,723
 - d. 12 months' salary in compensation.....296,124
 - e. Costs plus interest

The Respondent's Case

9. In its Reply dated 24th January 2018, the Respondent states that it fully complied with all the requirements of the law and that it paid the Claimant his monthly dues on time as agreed, from the time of his employment until the time the Claimant opted to desert duty.
10. The Respondent avers that the Claimant, together with his three colleagues were called upon, in the presence of the Union Shop Steward, to explain what had happened to the machines and possibly find a solution. However, the Claimant and his colleagues are said to have demanded for their final dues, indicating that they no longer wished to work for the Respondent.
11. The Respondent claims to have advised the Claimant to write an official resignation letter but the Claimant opted to walk out of the Respondent's premises without notice.
12. The Respondent denies dismissing the Claimant and states that the Claimant declined and/or ignored to report back to work, despite being called upon to do so. The Respondent claims to have issued a notice of intention to terminate the Claimant's services vide letter dated 12th December 2015.
13. The Respondent states that the notice to terminate the Claimant's employment on the ground of desertion of duty did not yield any response from the Claimant, which led the Respondent to terminate the Claimant's employment by letter dated 22nd September 2015, a copy of which was sent to the Labour Office and the Union Shop Steward.
14. The Respondent asserts that the Claimant's employment was terminated for justifiable and cause and in compliance with due procedure. The Respondent therefore asks the Court to dismiss the Claimant's claim with costs.

Findings and Determination

15. There are two (2) issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.



The Termination

16. The Respondent filed a letter dated 22nd September 2015, addressed to the Claimant as follows:

“Onesmus Muema Muteti

Employee No. 0166

Department: Paving

Dear Sir,

RE: Termination Of Services On Grounds Of Desertion Of Duty

The above matter refers.

We further refer to your employment terms with the company, our various telephone conversations, your various visits to the company and our letter dated 12th September 2015 facts and particulars whereof are well within your knowledge and information.

We note with profound concern that you have neglected your duties by failing, refusing, decline (sic) and/or ignoring to report to work despite being called upon to do so.

Premised on the foregoing we write to advise that the management has decided to terminate your service with immediate effect from the date hereof.

Kindly visit our HR office as soon as possible so that you can be detailed on the clearance procedure after which you will be paid your terminal dues IF ANY less statutory dues and or amounts owing to the company.

In keeping with the HR policies we shall issue you with a certificate of service.

We wish you well in your future endeavors

Kind regards

(signed)

Human Resource Manager

Copy to: District Labour Officer.

Union Shop Stewards.”

17. The Respondent also produced a preceding letter dated 12th September 2015 addressed to the Claimant as follows:

“Onesmus Muema Muteti

Employee no. 0166

DEPARTMENT: PAVING

Dear Sir,

RE: Notice Of Intention To Terminate Services On Grounds Of Desertion Of Duty

The above matter refers.

We further refer to your employment terms with the company facts and particulars whereof are well within your knowledge and information.



We note with profound concern that you have neglected your duties by failing, refusing, decline (sic) and/or ignoring to report to work as is required of you without due notice to the management.

It has come to our attention that you have not reported to work since 5th September 2015 after you walked away on 4th September 2015.

Take Notice that your act of deserting duty not only offence (sic) the provisions of the [employment Act](#) Cap 226 Laws of Kenya but also contravenes the company policies.

Take Further Notice that if you do not report to work within 24 hour (sic) of receipt of this letter and or if we do not hear from you within seven days hereof we shall proceed to terminate your services summarily with (sic) further reference to you.

By copy of this letter the relevant authorities and institution are accordingly notified.

Kind regards

(signed)

Human Resource Manager

Copy to: District Labour Officer.

Union Shop Steward”

18. The two letters, under the hand of an unidentified Human Resource Manager, accuse the Claimant of deserting duty.
19. In the final submissions filed on behalf of the Claimant, reference was made to the decision in [Ronald Nyambu Daudi v Tornado Carriers Limited \[2019\]](#) eKLR where this Court stated as follows:

“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.”
20. Desertion is therefore not a self-evident defence against a claim of unlawful or unfair termination of employment; it must be proved.
21. More significantly, desertion of duty is not the same as absenteeism from duty. The distinction was made in the South African case of *Seablo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) as follows:

“.....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. On the other hand.....an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”
22. In the termination letter dated 22nd September 2015, the Respondent refers to various telephone conversations with and visits to the company by the Claimant. This statement begs the question as to



how an employee who has engaged in various telephone conversations with an employer in addition to making various visits to the employer's premises can be said to have deserted duty.

23. Moreover, the Respondent's witness, Sandeep Varia told the Court that the letters dated 12th September 2015 and 22nd September 2015 were not served on the Claimant. Instructively, the Claimant himself denied receiving any of the letters.
24. In view of the foregoing, I find and hold that the Respondent has failed to prove a case of desertion against the Claimant. The corollary finding is that the Claimant's testimony that he was dismissed verbally, without justifiable cause was not dislodged.

Remedies

25. I therefore award the Claimant six (6) months' salary in compensation for unlawful and unfair termination of employment. In making this award, I have considered the Claimant's length of service (2011-2015) and the Respondent's unlawful conduct in the termination transaction.
26. I further award the Claimant one (1) month's salary in lieu of notice.
27. In the absence of leave records to show that the Claimant had exhausted his leave, the claim for leave pay succeeds and is allowed.
28. No basis was laid for the claim for service/gratuity which therefore fails and is disallowed.
29. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 6 months' salary in compensation.....Kshs. 148,062
 - b. 1 month's salary in lieu of notice.....24,677
 - c. Leave pay for 4 years (24,677/30*21*4).....69,096Total.....241,835
30. This amount will attract interest at court rates from the date of judgment until payment in full.
31. The Claimant will have the costs of the case.
32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF OCTOBER 2023

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JUDGE

Appearance:

Ms. Alividza for the Claimant

Mr. Kerio for the Respondent

