



**Kiarie v Bidco Oil Refineries Limited (Cause 145 of 2016)
[2023] KEELRC 2514 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2514 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 145 OF 2016
L NDOLO, J
OCTOBER 18, 2023**

BETWEEN

ANTHONY MURIGI KIARIE CLAIMANT

AND

BIDCO OIL REFINERIES LIMITED RESPONDENT

JUDGMENT

1. This matter was initially dismissed for want of prosecution by Onyango J on 25th February 2019. In a subsequent ruling dated 9th October 2020, the Judge set aside the dismissal order and directed the Claimant to pay Kshs. 20,000 as costs to the Respondent.
2. The matter proceeded inter partes before me, with the Claimant testifying on his own behalf and the Respondent calling its Human Resource Officer, Serah Wangethi. Thereafter, the parties filed written submissions.
3. The Claimant's claim is documented by a Memorandum of Claim dated 26th January 2016 and filed in court on 5th February 2016. The Respondent filed a Memorandum of Reply dated 3rd October 2016.

The Claimant's Case

4. In his Memorandum of Claim dated 26th January 2016 and filed in court on 5th February 2016, the Claimant states that he was employed by the Respondent as a driver from 11th October 2004. He gives his monthly salary as at the time of termination as Kshs. 18,900.
5. The Claimant states that on 5th June 2012, while on duty, he was accused of stealing property belonging to the Company. He was arrested and booked at Thika Police Station. He was arraigned at Thika Law Courts on 6th June 2012.



6. The Claimant further states that while the criminal case was still pending in court, the Respondent paid him Kshs. 57,000. He was not issued with any termination letter.
7. The Claimant was acquitted of the criminal charges on 15th July 2015 after which he reported to the Respondent's premises for deployment. He claims to have been informed that he stood dismissed.
8. The Claimant asserts that the Respondent's action of sending him away amounted to wrongful and unfair dismissal. He now claims the following:
 - a. One month's salary in lieu of notice.....Kshs. 18,900
 - b. Leave pay for one year.....18,900
 - c. 12 months' salary in compensation.....226,800
 - d. Costs plus interest

The Respondent's Case

9. In its Memorandum of Reply dated 3rd October 2016, the Respondent states that the Claimant was engaged as a pool driver in the Human Resource Department, effective 12th July 2007 and not 11th October 2004 as pleaded by the Claimant. The Respondent concedes that the Claimant's last salary was Kshs. 18,900.
10. The Respondent states that the Claimant worked as a driver until 5th June 2012, when he was suspected to be involved in theft of company products. The Respondent admits that the Claimant was arrested after assorted items; including soaps, fat and empty containers were stolen. He was charged together with five other individuals.
11. The Respondent states that the Claimant was paid Kshs. 53,891 by cheque dated 23rd May 2013 being his pension dues, which he duly acknowledged.
12. The Respondent avers that the Claimant was not issued with a termination letter because he absconded from duty for over three (3) years and the Respondent had no knowledge of his whereabouts.
13. The Respondent admits that judgment was delivered on 15th July 2015 in Criminal Case No 2649 of 2012 but denies that the Claimant was acquitted. The Respondent states that the Claimant and his co-accused were discharged because the prosecutor did not call the investigating officer to give evidence with respect to the investigations that were carried out.
14. The Respondent accuses the Claimant of absconding duty for more than seven (7) days and reiterates that it had no knowledge of his whereabouts for 3 years.
15. The Respondent states that the Claimant was paid his terminal dues including pension and leave pay.

Findings and Determination

16. There are two (2) issues for determination in this case:
 - a. Whether the Claimant deserted duty or his employment was unlawfully terminated;
 - b. Whether the Claimant is entitled to the remedies sought.



Desertion or Unlawful Termination?

17. The Claimant's case is that his employment was terminated verbally on account of unproved allegations of theft made against him. In response, the Respondent asserts that the Claimant himself deserted duty by failing to report to work after he was released on bond.
18. Desertion of duty is one of the grounds upon which an employer is entitled to terminate the employment of an employee. However, like all other grounds, it must be proved and the way to prove it is to demonstrate that the deserting employee has been put on notice that termination on this ground is being considered.
19. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR 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. In the present case, although the Respondent alleges that the Claimant deserted duty, there was no evidence that the Respondent made any effort to reach out to the Claimant, either to summon him to resume duty or put him on notice that his employment would be terminated if he did not.
21. Even assuming that the Respondent was unable to reach the Claimant as alleged, it had the option of sending a notice to the nearest labour office that the Claimant had deserted duty.
22. Having failed to prove desertion against the Claimant, the Respondent lost its defence, leaving the Claimant's account that his employment was terminated verbally unassailed.

Remedies

23. In the result, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's unlawful conduct in bringing the employment to an end.
24. I further award the Claimant one (1) month's salary in lieu of notice.
25. In its Memorandum of Reply as well as in the testimony of its Human Resource Officer, Serah Wangethi, the Respondent states that the Claimant is entitled to Kshs. 18,900 in leave pay. The claim for leave pay is therefore admitted and is payable.
26. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 10 months' salary in compensation.....Kshs. 189,000
 - b. 1 month's salary in lieu of notice.....18,900
 - c. Leave pay for 29 days (18,900/30*29).....18,900Total.....226,800
27. This amount will attract interest at court rates from the date of judgment until payment in full.



28. The Claimant will have the costs of the case.

29. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF OCTOBER 2023.

LINNET NDOLO

JUDGE

Appearance:

Ms Alividza for the Claimant

Ms Kavagi for the Respondent

