



**Mochama v Kenya Nut Company Limited (Cause 2348 of 2017)
[2023] KEELRC 2450 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2348 OF 2017
JK GAKERI, J
OCTOBER 12, 2023**

BETWEEN

NYABUTO MOCHAMA CLAIMANT

AND

KENYA NUT COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 24th November, 2017 and amended on 1st March, 2018 alleging unfair and unlawful termination of employment.
2. The Claimant seeks judgement against the Respondent for
 - a. A declaration that the dismissal of the claimant was employment was unfair and unlawful.
 - b. An order compelling the Respondent to pay the Claimant a total sum of Kshs.615,549/=
 - i. One month's salary in lieu of notice Kshs.26,763/=.
 - ii. Service (26, 763 x 15/30 x20) Kshs.267,630/=
 - iii. Full compensation for loss of employment Kshs.321,156/=
 - c. An order compelling the Respondent to issue the claimant his certificate of service within 14 days from the date of judgment.
 - d. Costs and interests of this suit at the court rates.
 - e. Any further relief which the court may deem fit, just and expedient to grant.



3. On the 6th June, 2023 when the matter came up for hearing, the Claimant adopted his witness statement and was cross-examined.
4. The Claimant stated that he was employed by the Respondent on 28th February, 1995 as a supervisor with a monthly salary of Kshs.5,734/= and rose to the position of senior security supervisor at Kshs.26,763/= per month.
5. The Claimant avers that he worked diligently for the Respondent for 20 years and at no point was he served with a notice to show cause, warning or suspended from duty.
6. The Claimant states that on 29th June, 2015, he was verbally dismissed on allegation that he had stolen macadamia nuts from the Respondent on 26th June, 2015.
7. The Claimant further avers that he was arrested on 26th June, 2015 and was taken to Juja police station and released the next day. He testified that he reported to work at the respondent company on Monday and one Mr. Omari told him to conclude the criminal case first
8. The Claimant stated that the Criminal case 3190 of 2015 at Thika Law courts was withdrawn on 3rd November, 2017 for lack of witnesses.
9. The Claimant avers that prior to the dismissal he had never been summoned to appear before any disciplinary committee nor any disciplinary process undertaken.
10. In response to the Respondent's counter-claim, the Claimant denies the allegation that he absconded duty and avers that the Respondent is not entitled to the relief sought in the counterclaim.

Respondent's case

11. In response to the memorandum of claim, the Respondent filed a Statement of Defence and a Counter-claim dated 29th January, 2018 denying the allegations by the Claimant.
12. In its Counter claim the Respondent prays for 3 months' salary in lieu of notice, Kshs.26,763 x 3 = Kshs.80,829/=.
13. The Respondent prays for;
 - a. Special Damages of Kshs.80,000/=
 - b. General Damages
 - c. Cost of the suit; and
 - d. Interests on (a) and (b) above.
14. When the matter came up for defence hearing, one George Orori, the Research and Nursery Manager of the Respondent's Hatwara farm testified in defence of the Respondent's claim and Counter claim.
15. In the Counter claim, the Respondent avers that the Claimant intentionally failed to disclose that on the 26th June, 2015, he and two others were arrested by Juja police on allegation of attempted theft of macadamia nuts using a vehicle with a strange registration number KIA-ORA at the Respondent's farm.
16. The witness stated that the Claimant neither resumed work nor notify the Respondent the reasons not resuming duty.



17. The witness avers that the Claimant's desertion amounted to a breach of the contract of employment.
18. The witness stated that it was impossible to institute disciplinary proceedings against the Claimant as he had deserted and his whereabouts were unknown.

Claimant's submissions

19. The Claimant's counsel highlighted three issues for determination;
 - a. Termination versus abscondment.
 - b. Is the claimant entitled to the reliefs sought?
 - c. Counter claim.
20. Counsel submitted that during the period the Claimant was incarcerated, the night of 26th June, 2015 to 27th June, 2015, the Respondent was aware of his whereabouts as it had called the police to arrest him.
21. It was submitted that when the Claimant reported to work, Mr. Orori informed him to conclude the criminal matter before he could resume work.
22. Counsel relied on Section 41(1) of the *Employment Act* which provides;

“An employer shall before terminating the employment of an employee, on the ground of misconduct, poor performance or physical incapacity explain to the employee in a language that the employee understands the reasons for which the employer is considering termination and the employee shall be entitled to another employee or shop floor union representative of his choice present during the explanation.”
23. The Claimant's counsel further submitted that the Respondent did not conduct an investigation of the allegation nor provide evidence showing that the Claimant was convicted in a criminal case.
24. Counsel submitted that the reasons for termination were not proven rendering the termination unjustified, unreasonable and unfair as it was in contravention of Sections 43(1), 45(2)a, 45(4)b and 41(2) of the *Employment Act*, 2007.
25. On the allegation of absconding duty, the counsel submitted that the employer should have required the employee to resume duty and warn him of disciplinary action if he failed to do so.
26. Reliance was made on the holding in *James Okeyo v Maskant flower limited* (2015) eKLR where the court observed that;

“... the employee who deserts employment does not dismiss himself so to speak. The decision to formally end the employment relationship should come from the innocent party.”
27. Counsel submitted that the Respondent did not demonstrate the efforts made to ensure that the Claimant resumed work and the instant case did not qualify as a termination on the basis of absconding duty.
28. Counsel contended that having established that the termination of employment was unfair, the Claimant was entitled to the reliefs sought.
29. On the counter claim, the counsel submitted that since the Respondent did not show that the Claimant absconded duty, the counter claim should fail.



30. Finally, counsel submitted that the Respondent's prayer for 3 months salary in lieu of notice was not provided for in the contract of employment and was therefore baseless.

Respondent's submissions

31. The Respondent's counsel addressed two issues, namely;

- a. Whether the claimant deserted work, or was unfairly dismissed?
- b. Whether the Claimant is entitled to the remedies sought?

32. Counsel submitted that the Claimant failed to prove that he was verbally dismissed by the Respondent as by law required under sections 107, 108 and 109 of the Evidence Act and urged the court to dismiss the claim with costs.

33. Counsel submitted that the Claimant deserted duty and attempts to reach him failed.

34. Reliance was made on the sentiments of the court in *Rita Asenja Ahunguya v Jan Geu Grootenhuis* (2020) eKLR where the court held;

“The burden of proving that she reported back to work on the said date or at all rests with the claimant. She however did not adduce any evidence or produce any documentary evidence or call any witnesses to support her allegation that she reported back on 12th August 2014 and she was told by her employer that her employment was over.”

35. Counsel further submitted that since the Claimant had not proved the termination of his employment, the evidence that he had absconded duty overwhelmed the allegation that he was dismissed and urged the court to uphold the Respondent's counter claim and dismiss the Claimant's claim.

36. According to the Respondent, the Claimant was not entitled to the reliefs sought as he did not prove his case.

37. Counsel submitted that it was willing and ready to issue the claimant with a certificate of service.

Findings and determination

38. The issues for determination are;

- i. Whether the Claimant absconded duty or was summarily dismissed by the Respondent.
- ii. Whether the Claimant is entitled to the reliefs sought?
- iii. Whether the Respondent is entitled to the reliefs sought in the counter claim?

39. On the 1st issue, the Claimant alleged that he was arrested on the 26th June, 2017 and taken to Juja police station but released on the 27th June, 2017. He stated that he reported to work on Monday 28th June, 2015 when he was told to first deal with the criminal case then return to work.

40. What is worth noting is that it is the Respondent that had complained to the police and the Claimant was charged with stealing macadamia nuts from the Respondents farm.

41. The Respondent on the other hand stated that since the claimant was arrested, he absconded duty and it did not know of his whereabouts.



42. According to Black's Law Dictionary (10th Edition), 2010, desertion means:
- “The wilful and unjustified abandonment of a person's duties or obligations.”
43. The South African decision in *Seabolo V Belgravia Hotel (Supra)* is often cited for the distinction between desertion and unauthorised absence as follows;
- “... an 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.”
44. Although the Claimant claimed in cross-examination that he returned to work, he also confirmed that he did not return to the work place. It is however not disputed that the Claimant did render any services to the Respondent after his arrest on the 26th June, 2015.
45. Having occasioned the Claimant's arrest, the Respondent could allege that it was unaware of his whereabouts. It was the complainant in Criminal Case Number 3190/2015 that was alive in court and made no attempts to ascertain his whereabouts. It was the Respondent's duty to demonstrate the steps it had taken to ensure that the Claimant resumed duty.
46. In *Felistas Acheha Ikatwa vs Charles Peter Otieno (2018)eKLR*, Maureen Onyango held;
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
47. The provisions of Section 41 of the *Employment Act*, 2007 provide for the procedure that an employer contemplating termination of an employee's employment or summarily dismissing an employee must comply with. There is consistent jurisprudence that the procedure for termination of employment is mandatory and failure to comply with the procedure renders the termination unfair procedurally.
48. Even if the Claimant provided no evidence to support his claim that he reported to work but was denied access until the criminal case was concluded, the Respondent is similarly estopped from denying the fact that it was aware of the Claimant's whereabouts.
49. As regards procedural fairness, it was incumbent on the Respondent to demonstrate that it accorded the Claimant an opportunity to defend himself as by law required.
50. The Respondent did not adduce any evidence to show that it called the Claimant or requested him to return to work or informed him that he would be dismissed from employment if he did not do so.
51. The allegation that the Claimant deserted duty was not supported by evidence.
52. Having failed to prove that the Claimant absconded duty, the Respondent failed to demonstrate that the Claimant's employment came to an end fairly as required by law.
53. For the above reasons, it is the finding of the court the termination of the Claimant's employment by the Respondent was substantively and procedurally unfair and the Claimant is entitled to the reliefs as follows;
- a. One month's salary in lieu of notice



54. The Respondent adduced no evidence that it accorded the Claimant the requisite notice or paid in lieu of notice as ordained by Section 36 of the [Employment Act](#), 2007. The Claimant is awarded one month's salary in lieu of notice.
- b. Service
55. Assuming that this claim relates to service pay under Section 35(5) of the [Employment Act](#), 2007, the same is unsustainable on account that the Claimant adduced no evidence to demonstrate his entitlement to service pay.
56. A statement from the National Social Security Fund (NSSF) would have shown that the Respondent was not remitting NSSF deductions. Finally, copies of payslips on record show that the Respondent was deducting NSSF contributions.

The claim is dismissed.

57. Having found that the Claimant's employment was unfairly terminated by the Respondent, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007.
58. In determining the quantum of compensation, the court has taken into consideration the fact that the Claimant worked for the Respondent for about 20 years, with no misconduct or disciplinary issues. However, the Claimant substantially contributed to the termination of employment as he did not adduce any evidence of having reported to work after his release by the police.
59. Similarly, the Claimant did not appeal the Respondent's decision or demonstrate his desire to continue in the Respondent's employment.
60. In the circumstances, the court is satisfied that the equivalent of 6 months' salary is fair.
- (d) Certificate of service
61. The Claimant is entitled to a certificate of service by dint of Section 51 of the [Employment Act](#), 2007.

Counter-Claim

62. Having found that termination of the Claimant's employment was unfair and the Respondent failed to prove its counter claim, it is dismissed with costs.
63. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of the Claimant's employment was unfair.**
 - b. One month's salary in lieu of notice.**
 - c. Equivalent of 6 months' salary.**
 - d. Costs of this suit.**
 - e. Interest at court rates from date of judgement till payment in full.**
 - f. Certificate of service.**

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH 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

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