



**Okoth v Micos Dry Cleaners (Cause 2018 of 2017)  
[2023] KEELRC 3048 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3048 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2018 OF 2017  
JK GAKERI, J  
NOVEMBER 29, 2023**

**BETWEEN**

**MILLICENT ADHIAMBO OKOTH ..... CLAIMANT**

**AND**

**MICOS DRY CLEANERS ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 9<sup>th</sup> October, 2017 alleging non-payment of terminal dues.
2. The Claimant avers that she joined the Respondent's employment on 1<sup>st</sup> July, 2007 as a Receptionist/Sorter at a salary of Kshs.7,000/= per month and served diligently until 2015 having received salary increments up to Kshs.12,880.00 per month.
3. According to the Claimant, she fell ill in October 2015 and was unable to attend work and finally resigned in October 2015 on medical grounds.
4. That the decision was involuntary as she was denied sick leave due to deteriorating health.
5. The Claimant avers that the Respondent required her to work extra hours every day on Saturdays and public holidays and no overtime was paid and the October salary was not paid nor was a certificate of service issued.
6. That the Respondent refused to pay service pay and house allowance.
7. The Claimant prays for:
  - i. Salary for October 2015 Kshs.12,880.00.
  - ii. Service pay at 15 days per year Kshs.45,080.00.
  - iii. Salary in lieu of leave 7 years Kshs.90,160.00.



- iv. Overtime for 7 years 3 months Kshs.154,560.00.
- v. House allowance at 15% (87 months) Kshs.168,084.00.
- vi. Salary in lieu of unfair termination Kshs.154,071.00.  
Total Kshs.630,071.00
- vii. Costs of the suit.
- viii. Interest on (i - vii) above at commercial rates of 20%.
- ix. Any other and/or further relief that the court may deem fit to grant.

### **Respondent's case**

- 8. The Respondent admits that the Claimant was its employee as alleged.
- 9. The Respondent alleges that the Claimant was negligent, committed acts of gross misconduct, in particular theft, fraud and dishonesty as discrepancies were noted in records between January 2014 and 20<sup>th</sup> November, 2015 as amounts received were not reflected in the Respondent's account at the work station and the 1<sup>st</sup> warning was issued on 18<sup>th</sup> November, 2015.
- 10. That the Claimant absconded duty on 18<sup>th</sup> November, 2015 and a second warning letter was issued on 26<sup>th</sup> November, 2015 and a further letter on 28<sup>th</sup> November, 2015.
- 11. That the Respondent received the Claimant's letter of resignation on 27<sup>th</sup> November, 2015 and was dismissed on 27<sup>th</sup> November, 2015.
- 12. It is the Respondent's case that the dismissal letter required the Claimant to pay the amount lost while in her custody.
- 13. That the Claimant responded to the letters vide letter dated 4<sup>th</sup> January 2016.
- 14. That the Respondent had on numerous occasions given the Claimant leave and due procedure was followed in dismissing the Claimant.

### **Claimant's evidence**

- 15. On cross-examination, the Claimant admitted that she received the letter dated 23<sup>rd</sup> November, 2015 and drafted and signed the resignation letter dated 22<sup>nd</sup> November, 2015 received on 27<sup>th</sup> November, 2015.
- 16. It was her testimony that she was forced to do so on medical grounds.
- 17. The witness further confirmed that from 18<sup>th</sup> - 26<sup>th</sup> November, 2015, she was unwell and was on sick leave from 6<sup>th</sup> November to 13<sup>th</sup> November, 2015 and the Manager gave her sick leave but had no evidence of the leave.
- 18. That she did not write any other letter after resignation but admitted having authored the letter dated 4<sup>th</sup> January, 2016.
- 19. That the Respondent's letters dated 23<sup>rd</sup>, 26<sup>th</sup> and 28<sup>th</sup> November 2015 did not require an explanation but payment of money.
- 20. It was her testimony that she received the termination after she had resigned on 27<sup>th</sup> November, 2015 while on leave.



21. That the termination of employment was on 23<sup>rd</sup> November, 2015.
22. It is the Claimant's testimony that although she prays for leave, she admitted having filled application forms on pages 3-35 of the Respondent's Bundle of Documents and that she proceeded on leave.
23. That although she prayed for overtime for weekends and public holiday, she had no evidence as it was not for her to prove. That house allowance was part of the agreement.
24. That she gave notice of resignation and left work and did not pay in lieu of notice.
25. On re-examination the witness testified that she had applied for leave from 18<sup>th</sup> to 23<sup>rd</sup> November, 2015. That no investigation was conducted by the Respondent.

### **Respondent's evidence**

26. On cross-examination, PW1, Mr. Fred Oballa confirmed that he has been the Respondent's General Manager for the last 15 years and the Claimant responded to the letters vide letter dated 4<sup>th</sup> January, 2016.
27. The witness further confirmed that the Respondent did not avail the results of the audit to the Claimant and no notice to show cause was issued.
28. The witness testified that although the Claimant completed a leave application form for 5 days from 18<sup>th</sup> - 23<sup>rd</sup> November, 2015, the document was not signed by the Managing Director.
29. According to the witness, the letter dated 26<sup>th</sup> November, 2015 accused the Claimant of absconding duty.
30. That the Respondent paid all the Claimant's dues but had no evidence to show that the Claimant's salary for October 2015 was paid.
31. On re-examination the witness testified that the Claimant's letter dated 4<sup>th</sup> January, 2016 was written after she had left employment.
32. The witness further testified that the Claimant's services were not terminated.
33. That the Claimant's application for 5 days leave was not authorized by the Managing Director.

### **Claimant's submissions**

34. Counsel for the Claimant isolated one issue for determination, namely; whether the Claimant is entitled to the reliefs sought.
35. According to counsel, the Claimant resigned before the Respondent allegedly terminated her employment on 27<sup>th</sup> November, 2015 and the Respondent conducted no investigations on the alleged misconduct as evidenced by its letter to the Claimant dated 26<sup>th</sup> November, 2015.
36. That as a consequence, the Claimant was entitled to October 2015 salary as the Respondent tendered no evidence of payment and house allowance as provided by Section 31 of the [Employment Act](#).
37. Reliance was made on the sentiments of the court in Daniel Njuguna Muchiri V Sagar Bakery Ltd as well as James Ndambuki Muoka V Sat Joiners Ltd.
38. As regards overtime, counsel urged that since the Claimant's working hours were 7.00 am to 6.00 pm and 7.00 am to 5.30 pm on Saturdays, she was entitled to overtime.



39. Reliance was also made on the decision in *Rogoli Ole Manadiegi V General Cargo Services* as well as *Wycliffe Juma Ilukol V Board of Management Father Okodui Secondary School* (2022) eKLR.
40. The claims for service pay, salary in lieu of termination and pay in lieu of leave appear to have been abandoned.

### **Respondent's submissions**

41. As regards salary in lieu of termination, counsel urged that the relief was not envisioned by the *Employment Act, 2007* and granting it would be inconsistent with the provisions of Section 45 of the Act.
42. That in any case, termination of the Claimant's employment was lawful and justified as she was engaged in theft, fraud and dishonesty and absented herself from duty unlawfully as evidenced by the warning letters on record.
43. On the unpaid salary for October 2015, it was submitted that after dismissal, all outstanding dues were paid and in any event the Claimant owed the Respondent Kshs.22,800/= as monies not accounted for.
44. On service pay, counsel relied on the provisions of Section 35(6)(d) of the *Employment Act, 2007* to urge that the Claimant was not entitled to the same.
45. The decision in *Matsesho V Newton* (2022) was also cited.
46. That the Claimant was not entitled to salary in lieu of leave as evidence on record showed that the Claimant proceeded on leave regularly.
47. As regards overtime, counsel submitted that the Claimant worked as the parties had agreed and the claim for overtime could not arise.
48. Finally, counsel submitted that the salary negotiated by the Claimant was consolidated as envisaged by Section 31 of the *Employment Act, 2007* and no house allowance was due to the Claimant.

### **Determination**

49. The issues for determination are;
  - i. Whether the Claimant resigned or her employment unfairly terminated by the Respondent.
  - ii. Whether the Claimant is entitled to the reliefs sought.
50. On the 1<sup>st</sup> issue, parties have adopted opposing positions with the Claimant maintaining that she resigned from employment on medical grounds. The Respondent on the other hand submitted that it terminated the Claimant's employment for misconduct.
51. On resignation, the court proceeds as follows:
52. Black Law Dictionary, 10<sup>th</sup> Edition defines resignation as;

“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave ones job or organization, often in the form of a written statement.”
53. In *Edwin Beiti Kipchumba V National Bank of Kenya Ltd* (2015) eKLR, the court defined resignation as a unilateral act on the part of the employee.



54. As held by Rika J. in *Kennedy Obala Oaga V Kenya Ports Authority (2018) eKLR* as well as in *Herbert Wafula Waswa V Kenya Wildlife Services (2020) eKLR*, resignation of an employee terminates the employment relationship with immediate effect and does not require acceptance by the employer.
55. Needless to belabour, employees have often used resignation to avoid disciplinary action by the employer. In such instances, any disciplinary action taken by the employer has no effect as there is no relationship between the parties.
56. In the instant suit, documentary evidence on record reveal that the Claimant tendered her resignation by a handwritten letter dated 22<sup>nd</sup> November, 2015, received by the Respondent on 27<sup>th</sup> November 2015, facts the Claimant admitted on cross-examination.
57. The two line letter to the Chief Executive Officer of the Respondent was emphatic that the resignation was immediate, was occasioned by undisclosed unavoidable circumstances and the Claimant apologized for any inconvenience the resignation would occasion.
58. Although the Claimant alleged that she was forced to resign on medical grounds, she adduced no iota of evidence to demonstrate by whom and when coercion was exerted on her as she was allegedly on sick leave from 18<sup>th</sup> November, 2015.
59. Similarly, the Claimant has not pleaded that she was constructively dismissed by the Respondent.
60. Relatedly, the Respondent dispatched a letter dated 26<sup>th</sup> November, 2015 accusing the Claimant for absconding duty from 18<sup>th</sup> November, 2015. The letter requested the Claimant to hand over all company property immediately and pay Kshs.22,800/= allegedly lost at the Galleria branch in October/November 2015. It also added that more liability could arise after full audit was carried out.
61. Finally, the letter made reference to payment of one month's salary in lieu of notice.
62. By this letter, the Respondent would appear to have regarded its relationship with the Claimant as non-existent yet she was still its employee.
63. The letter did not demand an explanation for the alleged desertion.
64. The Claimant admitted having received the letter after she had already resigned.
65. Puzzlingly, the Claimant would appear to have construed the letter dated 23<sup>rd</sup> November, 2015 as the termination letter.
66. The letter under reference "Final Reprimand over Negligence" is in the court's view not a letter of termination of employment for the simple reason that it did not expressly or impliedly state so.
67. Although the letter expresses the Respondent's displeasure with the Claimant's performance, alleged theft, fraud, dishonesty and the fact that it had lost confidence in her, it merely demands payment of Kshs.22,800/= failing which "stern action including dismissal from employment with loss of salary in lieu of notice" would ensue. Such action could only be taken against an employee.
68. Surprisingly, neither of the parties' adduced evidence to demonstrate how the letter dated 22<sup>nd</sup> November, 2015 from the Claimant and the letter dated 23<sup>rd</sup> November from the Respondent were served, which would have explained the apparent delay.
69. Be that as it may, RWI did not controvert the Claimant's testimony that she resigned before the alleged termination letter was received.



70. Indeed, the Respondent's witness confirmed on cross-examination that the Respondent did not issue a notice to show cause to the Claimant as she had absconded duty yet she had applied for 5 days leave effective 18<sup>th</sup> November, 2015.
71. More significantly, RWI testified on re-examination that the Claimant's services were never terminated by the Respondent as she deserted the workplace.
72. The law on desertion of duty by an employee is well settled. An employer who pleads that an employee deserted the workplace must demonstrate the efforts made to contact the employee and notify him or her that termination of employment was being considered for the desertion. A notice to show cause is necessary.
73. (See *Felistas Acheha 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 and *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* (2020) eLKR among others)
74. From the evidence on record, it is the finding of the court that the Claimant resigned from her employment voluntarily. The alleged termination of employment by the Respondent was not supported by evidence.
75. On the reliefs sought, the court proceeds as follows;
- a. Unpaid salary for October 2015 Kshs.12,880.00
76. Although RWI testified that the Respondent paid the Claimant's dues, he admitted that he had no documentary evidence of the payment and none was availed.
- The Claimant is awarded Kshs.12,880.00 being the salary for October 2015.
- b. Service pay Kshs.45,080.00
77. The Claimant's National Social Security Fund statement dated 30<sup>th</sup> August, 2016 reveal that she was a registered member of National Social Security Fund effective 25<sup>th</sup> June, 2007 and contributions were remitted upto the end of January 2015.
78. Needless to gainsay, Section 35(6)(d) of the *Employment Act*, 2007 disqualifies members of the NSSF from service pay.
- The prayer is dismissed.
- c. Salary in lieu of leave for 7 years
79. The Claimant admitted on cross-examination that she proceeded on annual leave regularly and leave application forms on record show that she indeed proceeded on leave from 2007 to 2015.
80. The documents provided by the Respondent which the Claimant admitted were her leave application forms reveal for instance that in 2015, she was on leave for 21 days, 25 days in 2014, 24 days in 2013, 2012 and 2011. Noteworthy, there is no year the Claimant did not proceed on leave.
- The claim for salary in lieu of leave is unmerited and is dismissed.
- d. Overtime allowance for 7 years Kshs.154,222.00
81. The Claimant's letter of employment dated 27<sup>th</sup> July, 2007 stated that her work day was from 7.00 am to 6.00 pm with one (1) hour lunch break and 7.00 am to 5.30 pm on Saturday.
82. In addition, the agreement stated that "The hours of work may be varied to suit the work situation".



83. The Claimant admitted that these were the terms of engagement and she acted accordingly.
84. The agreement made no reference to payment of overtime and the Claimant tendered no evidence of particulars of the overtime claimed besides the provisions of the agreement between the parties.
85. On cross-examination, however, the Claimant confirmed that she was praying for the extra hours on Saturday and public holidays, but did not provide any particulars.
86. Relatedly, the Claimant availed no evidence of having raised the issue with the Respondent since 2007. The claim for overtime is unproven and is declined.
  - e. House allowance Ksh168,084.00
87. Although RWI testified that the letter of employment provided for a consolidated salary of Kshs.7,000/= per month, he tendered no evidence to demonstrate compliance with the provisions of Section 31 of the Employment Act, 2007.
88. Paragraph 1 of the letter of offer provides inter alia. The Respondent offered the Claimant employment as a Receptionist/Sorter “with effect from 1<sup>st</sup> July, 2007 at a salary of Kshs.7,000/= per month”.
89. It is unclear as to whether the amount quoted was the basic salary or gross and neither party provided a copy of the payslip required by Section 20 of the Employment Act, 2007.
90. In the absence of evidence to show that the salary quoted was consolidated, the provisions of Section 10(7) of the Employment Act, 2007 apply and the burden is on the employer to prove the consolidation as alleged.
91. Housing, is one of the statutory rights provided by Employment Act, 2007 and it is the duty of the employer to demonstrate that it catered for the housing of the employee by way of providing housing or housing allowance to enable the employee secure reasonable housing.
92. Since the Respondent failed to establish that the salary it paid the Claimant was consolidated as alleged by RWI, the Claimant’s prayer for housing allowance is merited and is awarded at 15% of Kshs.12,880.00 for a period of 3 years, Kshs.69,552.00
  - f. Salary in lieu of termination
93. Having found that the Claimant voluntarily resigned from employment which terminated the employment relationship between her and the Respondent, it is unclear to the court as to what the above-mentioned prayers comprises.
94. The court is in agreement with the Respondent’s counsel’s submissions that this prayer is not envisioned by the provisions of the Employment Act, 2007 and it is accordingly dismissed.
95. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows:
  - a. October 2015 salary Kshs.12,880.00.
  - b. House allowance for 3 years at 15% Kshs.69,552.00.  
Total Kshs.82,432/=
  - c. Costs of this suit
  - d. Interest at court rates from the date hereof till payment in full.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF NOVEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

