



**Mbuvi v Real Management Services (2002) Limited (Cause 724 of 2018)  
[2023] KEELRC 2897 (KLR) (14 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2897 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 724 OF 2018  
NZIOKI WA MAKAU, J  
NOVEMBER 14, 2023**

**BETWEEN**

**FREDRICK MUTUA MBUVI ..... CLAIMANT**

**AND**

**REAL MANAGEMENT SERVICES (2002) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent through a Statement of Claim dated 15<sup>th</sup> May 2018, for unfair and wrongful dismissal and refusal to pay him terminal dues. He averred that the Respondent offered him employment as a Caretaker on or about 17<sup>th</sup> March 2012, on a basic starting monthly salary of Kshs. 8,500/- that was reviewed over the period until it reached Kshs. 14,500/- per month exclusive of house allowance. He noted that even though his employment was reduced into writing, he was not issued with a letter of appointment as required by law. He further averred that during the course of his employment, the Respondent added him duties of a general labourer, doubling as a Gardener and a Cleaner at no extra costs.
2. It was the Claimant's averment that he worked for the Respondent with due diligence and faithfulness until on or about 5<sup>th</sup> January 2018 when the Respondent's Manager dismissed him from service on allegations of having reported to work on 3<sup>rd</sup> January 2018 instead of 2<sup>nd</sup> January 2018. That the Respondent neither advanced a lawful reason for the termination nor followed the required procedure prior to the said termination and that he was also not given any notice or letter to show cause why his services should not be terminated and was further denied his terminal benefits. According to the Claimant, his termination came immediately after the December and New Year festive season and a ban on night travel all over the country occasioned him the delay thus his late arrival and reporting on 3<sup>rd</sup> January 2018. He further averred that at the time of the termination, he had not taken leave and was not paid prorata leave. That his advocates wrote a demand letter to the Respondent, whose response was that it had followed all the laws to the letter. The Claimant's claim against the Respondent as



particularised in the Statement of Claim included one month's salary in lieu of notice, house allowance for 68 months, pay for 5 days worked in January 2018, job ex gratia, prorate leave for 9 months, 12 months' salary compensation for the unfair loss of employment, and a certificate of service. The Claimant further prayed for: a declaration that his dismissal from employment was wrongful, unfair and unlawful; costs of this suit; and interest on the monetary awards sought at Court rates from the time of filing the claim until repayment in full.

3. In reply, the Respondent averred in its Answer to the Memorandum of Claim dated 7<sup>th</sup> June 2018 that contrary to the Claimant's assertions, his employment was reduced into writing on 29<sup>th</sup> March 2012 in a Contract of Service that was effective until January 2018. That the said Contract detailed his obligations as caretaker of the premises. It further averred that it ensured that both the Claimant's PAYE, NSSF and NHIF were promptly paid on a monthly basis and further, that his house allowance was inclusive. According to the Respondent, the Claimant was thus not entitled to service pay. The Respondent averred that the Claimant had disciplinary issues as evidenced in both oral and written warning letters dated 21<sup>st</sup> November 2016 and 6<sup>th</sup> January 2017 that were issued to him. That it summarily dismissed him as under section 44 of the *Employment Act* because he breached his contractual obligations being that he absented himself from his work place without leave or other lawful cause; he wilfully neglected to perform work which was his duty to perform; and he neither provided any oral or written evidence at the time of his dismissal nor in the Statement of Claim. It was the Respondent's case that the Claimant absconded work on 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> December 2017, thus negating his excuse that he had travelled for December Holidays and further because its offices had not closed. It asserted that the Claimant was in fact present on 4<sup>th</sup> January 2018 as per the Minutes of the meeting and that when he was issued with his summary dismissal letter, he refused to sign the same.
4. The Respondent further averred that before terminating the employment of the Claimant on the grounds of misconduct and poor performance, it explained to him in Kiswahili, a language that he understands, the reason for which it was considering at that time of termination and that he and his representative Mr. John Njiru (another employee) were present. The Respondent stated that the Claimant was accorded a fair hearing despite his refusal to give reasons for his absence. That it wrote to the Claimant's advocates on 29<sup>th</sup> January 2018, inviting them to go collect the dues owed to him, which they never did and that the Claimant also refused to collect his certificate of service upon termination of his employment. It contended that the Claimant had not provided any evidence of the extra work he alleged the Respondent added him during the course of his employment. In this regard, the Respondent referred to page 2 of his said Contract at points 9 and 10, which specified his responsibilities as including cleaning the staircases twice a day, cleaning all corridor walls, floors and window glasses, the basement and the courtyard on a daily basis, and watering the plants in the courtyard on a daily basis.
5. The Respondent averred that the Claimant took leave with the last being for 3 days from 9<sup>th</sup> November 2017 to 13<sup>th</sup> November 2017 and that the balance of leave days due to him was 15 days. It believed that what was further due to the Claimant was one month's salary as notice pay, one day worked in January 2018, 15 days outstanding leave days, and a certificate of service. It prayed that the suit be dismissed with costs to the Respondent.
6. The matter was referred to a mandatory Court Annexed Mediation and the Mediator's Report was to effect that parties had reached an agreement for payment of the one month's salary as notice pay, 5 days worked in January 2018 (Kshs. 2,788/-), unpaid leave (Kshs. 8,177/-), and issuance of a certificate of service and letter of recommendation. The Report further noted that parties had however not agreed on the claims for house allowance, job ex gratia and 12 months' salary compensation, which this Court was therefore to make a determination on.



## Evidence

7. The Claimant testified that he used to seek permission from Mr. Njiru if he needed to be absent. That he was dismissed in the afternoon of 5<sup>th</sup> January 2018 without a hearing and that his supervisor, Mr. Njiru, refused to pick his calls. He asserted that he was not provided with any housing nor paid house allowance. The Claimant confirmed under cross-examination that he signed a Contract in March 2012, which provided his duties to include cutting grass and flowers and cleaning the stairs. He further confirmed that he filled a leave form in 2017 and that the Respondent used to pay his NHIF and NSSF. He notified the Court that the Respondent had made payment towards the dues agreed upon between parties during Mediation. According to the Claimant, he signed the warning letter of 21<sup>st</sup> November 2016 because Mr. Njiru had told him that his services would be terminated if he did not sign the said letter. He reiterated that he was not issued with a dismissal letter after he was orally told that his employment had come to an end. Further, that his salary was paid in cash. In re-examination, the Claimant stated that there was no letter from the Respondent complaining of his performance nor had it issued him with anything to show he had left work without permission. He denied having had a meeting with the directors, stating that he only met the lawyer, Michael.
8. The Respondent's witness testified that all workers in the company are entitled to 24 working days' leave. That the Claimant had made it a habit to abscond duty without notifying the office and that the tenants would call to complain, after which he was issued with warning letters. RW1 stated under cross-examination that they used to issue payslips even though they did not have a copy in court and confirmed that the copy of the Claimant's Contract before Court did not indicate the sum earned or whether the salary was consolidated. He asserted that they did not have a roster showing that the Claimant was absent and confirmed that they engaged the Claimant for six (6) years. He further asserted that he attended the meeting as the Claimant's representative pursuant to section 41 of the [Employment Act](#) and that the complainant was the company.

## Claimant's Submissions

9. The Claimant submitted on the issues of house allowance, job ex gratia and whether 12 months' compensation was merited. Regarding unfair termination, it was the Claimant's submission that by dint of section 35 of the [Employment Act](#), 2007, advance written notice ought to be given to an employee before termination of employment. That section 41 of the Act envisages an employer informing an employee of allegations where termination is contemplated on account of misconduct, poor performance or physical incapacity and affording the employee an opportunity to make representations. That section 43 of the Act places a burden upon the employer to prove the reasons for dismissal while section 45 obligates the employer to prove the reasons as justifiable, valid and fair. The Claimant submitted that the evidential burden placed on the parties under section 47(5) of the Act requires an employee to, in the first instance, demonstrate that an unfair termination of employment took place before the employer is then called upon to justify the reasons.
10. The Claimant submitted that the ELRC has been consistent on the duty of an employer who relies on absconding duty as a defence to a claimant's case. He cited the case of [Boniface Francis Mwangi v B.O.M. Iyego Secondary School](#) [2019] eKLR in which this Court stated that it was good practice for an employer to take the initiative of contacting the employee who absconds work, to find out the reasons for the failure to present themselves for work. The Claimant further cited the case of [Joseph Nzioka v Smart Coatings Limited](#) [2017] eKLR in which Nderi Nduma J. observed that dismissal on account of absconding must be preceded by evidence of reasonable attempt made to contact the concerned employee and that a show cause letter was issued to such employee to show cause why his services



should not be terminated on account of absconding duties. According to the Claimant, in so far as the Respondent did not give him any written notice of termination of employment in terms of section 35(1)(c) of the Act, the Court should return that he had passed the test under section 47(5) of the Act. In addition, since the Respondent's witness confirmed that no show cause and summons were issued to the Claimant and that he also did not get any letter asking him to be accompanied by a fellow employee, the Respondent failed to ensure procedural fairness in the Claimant's case. That this resulted in unfair termination that is addressed with payment of 12 months' compensation provided under section 49 of the *Employment Act*. That he had proved that the termination of his services violated sections 41, 43 and 45(1)(2)(a) and (c) of the *Employment Act*.

11. It was the Claimant's submission that the provisions of section 31(2) of the *Employment Act* give an employer three options i.e. to provide housing, pay house allowance or pay a consolidated salary. That for his case, he was paid a gross salary without an entry for house allowance and apart from deductions, no other allowances were available to him. He noted that in the case of *Milkah Khakayi Kulati v Sandstorm (Africa) Limited* [2014] eKLR, Ndolo J. in awarding house allowance for 30 days and 17 days found that in the evidence presented, there was no expressed intention that the claimant's salary was inclusive of house allowance. The said Court further observed that the claimant had not been issued with an employment contract and that as held by Mbaru J. in *Robai Musinzi v Safdar Mohamed Khan* [2012] eKLR, where an employer fails to document the terms and conditions of employment, the Court is left to interpret these terms. The Claimant submitted that the case of *Milkah Khakayi Kulati* (supra) was in consonance with the case before this Court. He urged this Court to find that there being no clear set contractual terms governing the Claimant and the Respondent, coupled with the failure to issue payslips showing an entry for house allowance, the Respondent's assertions were left bare. In addition, he had testified before Court that the Respondent neither housed him nor paid him house allowance while RW1 was categorical that the company did not pay house allowance as a separate item. In essence, the Claimant's stance was that the claim for house allowance was merited.
12. On the claim for job ex gratia, the Claimant submitted that mowing the compound and trimming hedges and flowers was not in his job description and there had been no issue raised as regards his attitude towards the additional role of a gardener. That the claim for job ex gratia was justified having been admitted as work he was given and did during his employment. As regards the claim for 12 month's salary compensation, the Claimant urged the Court to award the same as he lost his source of livelihood without notice and for no justifiable reasons. He contended that the Respondent had manufactured the warning letters and the dismissal letter in a bid to portray him as a bad employee and further questioned why an employer would hold on to a rogue employee for close to six years. It was the Claimant's submission that the Respondent should have enquired from him on what had caused his lateness with one day prior to the dismissal. That an award of compensation will thus demonstrate that the Court abhors the casual conduct of the Respondent and more so with respect to lower cadre employees. The Claimant further submitted that he was entitled to costs of the claim and interest at Court rates as a demand letter was issued to the Respondent but it chose to raise a sham defence and necessitated intervention of this Court.

### **Respondent's Submissions**

13. The Respondent submitted that the Claimant's contract of service, which it referred to as the Caretakers' Mandate, was signed by both parties pursuant to section 9 of the *Employment Act*. That RW1 confirmed in his testimony that house allowance being inclusive was a company policy that applied to all employees and that the Respondent had also provided evidence of having made deductions for NHIF and NSSF. It was the Respondent's submission that the Contract of Service having clearly stipulated all the duties required of the Claimant, it had shown that gardening formed



part of his obligations therein and was not extra work. On the ex gratia payment, the Respondent cited the case of *Nicolas Wachira Koiga v NCR Kenya Limited* [2013] eKLR in which the Court held that the fact an intended benefit is called ex gratia means it is not a right and that the court had previously dismissed a claim for over one year salary as ex gratia since the claimant could not have legitimately expected that which was not a normal payment by the company. According to the Respondent, the Claimant had not proved ex gratia as pleaded as he did not provide any evidence that there were other persons they worked together with. That RW1's testimony was that there was only one caretaker per property and a reliever was only appointed when a caretaker applies and is granted leave. The Respondent submitted that from the leave forms they presented to Court, it was evident that every employee was to first fill a leave form before proceeding for leave. That the Claimant having failed to fill a leave form, he had absconded work and did not provide proof that he notified anyone of his absence. That it had proved the offence of absconding from work against the Claimant and had been guided by section 44 of the *Employment Act* in summarily dismissing him. That it had also demonstrated the procedural dictates it afforded the Claimant in terms of explaining to him the reason it was considering at the time of termination and before his representative, Mr. Njiru, and affording him a fair hearing pursuant to section 41(1) and (2) of the *Employment Act*. It was the Respondent's submission that the Claimant was thus not entitled to the terminal benefits proposed in the prayers set out in his Statement of Claim and Submissions.

14. The Claimant seeks house allowance, job ex gratia and 12 months' salary compensation for unlawful termination, costs and interest, the other issues in his claim having been settled in mediation. The Claimant was a caretaker of the Respondent. His responsibilities inter alia were to make sure the staircases are cleaned twice a day, in the morning scrubbed with washing liquid and brush and afternoon should be swept, all corridors, walls, floors, and window glasses and basement should be cleaned and also court yard should be swept on daily basis. He was to see that the plants in the courtyard are watered daily. As such, the Claimant had the responsibilities attributed in the Respondent's response. He had to ensure the place was taken care of. Of note is that in the contract, there was no specification of any payments. The amount of 14,500/- was not shown to be inclusive of house allowance.
15. Section 35 of the *Employment Act* imposes an obligation to employers to provide housing and in the alternative pay house allowance. Since there was no evidence the Claimant was paid any house allowance, he would be entitled to the claim for house allowance which is 15% of the gross pay. The Claimant is only entitled to claim the same for one year as it was a continuing wrong in terms of section 90 of the *Employment Act*. As such, the Claimant would be entitled to Kshs. 2,175/- per month for 12 months making a total of Kshs. 26,100/- under this head. The Respondent asserted the claim for ex gratia is given gratis. In the case of *Nicolas Wachira Koiga v NCR Kenya Limited* (supra) the Court held that the fact an intended benefit is called ex gratia means it is not a right. I hasten to add that ex gratia connotes something that is free of charge, free, something given freely and gratuitously without charge and at no cost, without payment. It is a gift. In his claim, the Claimant asserts he was entitled to ex gratia. The Court finds and holds that he did not get it from the Respondent and cannot claim it as of right. Had the Respondent felt the need to give an ex gratia payment, they would have done so. On the matter of compensation for unlawful termination, there is evidence the Claimant was called for a hearing and his services terminated subsequently. As such, having been accorded the protections and safeguards under section 41 of the *Employment Act*, he cannot claim unfair or unlawful termination. On the matter of costs, the Respondent alludes to having had the dues and certificate of service ready for the Claimant to collect. There is no evidence the Claimant was notified to collect the sums due. The Respondent did not show the manner in which the Claimant's salary was paid each month. As such, the Claimant should have been paid but was not paid until he sought intervention of the Court



where the Respondent made payment of some amounts. Since the Respondent forced the elongation of the claim, it will be liable for costs of the suit. The Claimant shall be entitled to interest at court rates on the unpaid house allowance. In the final analysis, I enter judgment for the Claimant against the Respondent for:-

- a. Kshs. 26,100/- being unpaid house allowance;
- b. Cost of the suit.
- c. Interest in (a) above at Court rates from the date of judgment till payment in full.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

