Kudheiha Workers Union v Managing Director Pulver Karr Limited (Cause 1384 of 2018) [2023] KEELRC 2883 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2883 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1384 OF 2018

SC RUTTO, J

NOVEMBER 10, 2023

BETWEEN

KUDHEIHA WORKERS UNION ..... CLAIMANT

AND

THE MANAGING DIRECTOR PULVER KARR LIMITED ..... RESPONDENT

JUDGMENT

1. The instant suit was instituted by the Claimant Union on behalf of the Grievant, Mr. Peter Mutua. It is averred that the Grievant who was a member of the Claimant Union, was employed by the Respondent as a cleaner with effect from 23rd February 2011. It is further averred by the Claimant that on 15th September 2015, the Grievant was verbally suspended for unknown reasons. According to the Claimant, the Grievant did not abscond duty. The Claimant further avers that it used all avenues to resolve the matter. The Claimant's case against the Respondent is for reinstatement of the Grievant and payment of all his accrued salaries and allowances. The Claimant further seeks against the Respondent the sum of Kshs 350,542.92 being unpaid house allowance, underpayments, notice pay, compensation for loss of service, salary deducted for one week when he was on sick off, unpaid annual leave and service gratuity.

2. The Claim was opposed through the Respondent's Memorandum of Response dated 8th April 2021, in which it avers that the Grievant did not attempt to resume work after leaving his designated place of work on 15th September 2015. That this after the Grievant was found by his former supervisor Mr. Mathenge, talking to the primary school staff through the window as they were having tea while he was not on break. According to the Respondent, the Grievant is not entitled to the prayers and payments sought as he was not "sacked". Consequently, the Respondent has asked the Court to dismiss the claim with costs.

3. The Respondent further filed a Notice of Preliminary Objection dated 8th March 2017, which was premised on the ground that the Claimant purports to lift the corporate veil by suing the Managing

Director of the company rather than the company itself. That the company as duly incorporated is an independent entity with its rights and liabilities appropriate to itself. That further, the Respondent is merely an employee of the company and therefore does not bear personal liability for the company.

4. When the Preliminary Objection came up for hearing on 19th November 2019, the Court directed that the same be dealt with at the hearing of the main suit.

5. The matter proceeded for hearing on 6th July 2023, during which both parties called oral evidence.

Claimant's case

6. At the outset, the Grievant sought to rely on the documents filed alongside the Memorandum of Claim to constitute his evidence in chief. This was with the exception of the Medical Sheet whose production was successfully objected to by the Respondent.

7. The Grievant told the Court that on 15th September 2015, he received a warning letter on the basis that he was talking to his colleague while he was at work. He was told to sign the said warning letter if he wanted to continue working.

8. According to the Grievant, the alleged offence occurred in June while the warning was issued in September. He declined to sign the same. He left for home and the following day when he reported, he was not allowed to sign the attendance register by his supervisor Mr. Mathenge. He was therefore locked out of employment. This continued for a whole week.

9. In the Grievant's view, he was unfairly terminated.

10. Closing his testimony in chief, the Grievant asked the Court to allow his Claim as prayed.

Respondent's case

11. The Respondent Mr. Parul Bhatt, testified in support of his case. He identified himself as the Director of the company known as Pulver Karr Limited. He adopted his witness statement to constitute his evidence in chief and further produced the documents filed on his behalf as exhibits before Court.

12. It was the Respondent's evidence that on 7th June 2012, the Grievant's supervisor, Francis Were issued him with a warning letter for willfully disobeying lawful orders and engaging in time-wasting activities while at work.

13. On 21st December 2012, the Grievant's supervisor, Daniel Kamau issued him with a warning letter on grounds that he intentionally left work early without authority.

14. That further, on 15th September 2015, the Grievant's former supervisor, Boniface Mathenge found him talking to the primary school staff through the window as they were having tea. However, the Grievant was not on break. The supervisor confronted the Grievant on the same and asked him to explain himself. The Grievant became rude prompting the said supervisor to report the matter to him (Respondent).

15. Upon receipt of the report, he met with the Grievant on the same day and engaged him in a conversation in which the Grievant was very rude to him. To resolve any issues between the Grievant and his former supervisor, he asked him to confirm whether or not he wanted to continue working for the company of which the Grievant rudely replied stating "Whatever. You are the Boss." The Grievant later left the place of work and never returned.

16. It was the Respondent's further evidence that the Grievant did not attempt to resume work after leaving his designated place of work on 15th September 2015. The Grievant was served with a warning

letter from the Company's Administration Manager dated 18th September 2015, warning him of consequences for failure to resume work. The letter was received on 8th October 2015.

17. By a Letter dated 23rd September 2015, the Grievant's Union, claimed that the Grievant was verbally suspended from work on 15th September 2015. The letter does not state that at any point in time that the Grievant was unfairly terminated.

18. By way of response to the said letter, the company's Accountant informed the Grievant's Union that the Grievant was never verbally suspended as alleged but rather, he had been away from work without lawful authority from 15th September 2015. The letter was received by the Grievant on 8th October 2015. The Respondent contends that this reinforces that all communication between the company, the Grievant and his supervisors were always in writing. Therefore, his assertions that the suspension was verbal cannot be substantiated.

19. The Respondent further testified that by a letter dated 23rd November 2015, the Grievant sought to be paid his legal terminal benefits by the company which letter indicated that he had no intention of resuming work with the Company. They could not force the Grievant to resume work.

20. By a letter dated 7th January 2016 addressed to him (Respondent), the Grievant's Union sought to have a meeting to compute his terminal dues. The company through its letter authored by the Administration Manager dated 16th March 2016, informed the Grievant that a cheque had been drawn in his favour encompassing his terminal dues.

21. By a letter dated 18th October 2016, the Ministry for East African Community, Labour and Social Protection cited that the Grievant was unfairly terminated contrary to his assertions that he was verbally suspended from work.

22. The Respondent contended that at no time was the Grievant unfairly terminated from his workplace. That the Grievant intentionally absconded duty from 15th September 2015, prompting the company to issue a formal written warning letter, which letter explained to him that there would be consequences of failing to report back.

23. There has not been any response from the Grievant in relation to the said letter of 18th September 2015. He contended that if the Grievant ever intended to get back to work, the easiest thing would be to either simply report back and/or respond to the said letter and indicate willingness to get back to work. The Grievant has to date, never indicated willingness to get back to work in any form or color. That it would be a very onerous task to have him reinstated.

24. That further, the Claimant Union, never addressed the issue of the Grievant failing to get back to work and never attempted to request for his reinstatement.

25. The Respondent further denied being the Grievant's employer and averred that he did not pay his wages. He contends that the Grievant was employed by the company, Pulver Karr Limited, a legal entity capable of being sued in its own name. That this cause is non-suited as against him.

Submissions

26. The Claimant submitted that the Grievant's termination was ill-conceived. It was further submitted that the Respondent failed to show any attempts in according the Grievant a fair hearing. It was the Claimant's further submission that the Respondent failed to give the Grievant reason for termination or a chance to be heard or make his representation and be heard as required under Section 45 of the *Employment Act*. In support of this position, reliance was placed on the case of Walter Ogal Anuro vs

Teachers Service Commission (2013) eKLR and Anthony Mkala Chitavi vs Malindi Water & Sewerage Co. Limited (2013) eKLR.

27. It was further submitted by the Claimant that an employee accused of deserting duty must be accorded both substantive and procedural fairness. It was further submitted that the Respondent did not produce evidence to show any attempts to contact the Grievant who had served diligently and industriously for a period of 4 years. On this issue, the Claimant referenced the case of Simon Mbithi Mbane vs Inter Security Services Limited (2018) eKLR and Joseph Nzioka vs Smart Coatings Limited (2017) eKLR.

28. On the Respondent's part, it was submitted that the Grievant has not expressly pleaded that he was terminated. It was further submitted that the Grievant has not proved that he was suspended and terminated. That by implication of the letter of 18th September 2015, the Grievant was still in an employment relationship with Pulver Karr Limited. On this score, the Court was urged to find that the Grievant left work without leave and without notice and his phone was off.

29. Citing the case of Reuben Mahindi Mulama vs Menengai Oil Refineries Ltd (2016) eKLR and Jawadu Hamad Omar vs East Africa Sea Food Limited (2017) eKLR, the Respondent further submitted that the Grievant has failed to discharge his burden of proof under Section 47(5) of the *Employment Act*. To this end, the Respondent urged the Court to find that the Grievant has not proved that he was terminated at all.

Analysis and determination

30. From the pleadings on record as well as the evidentiary material placed before the Court and the rival submissions, the following issues stand for determination: -

    a. Whether the Respondent is a proper party to this suit;

    b. Depending on the answer to (a), whether the Grievant absconded duty or was unfairly terminated from employment;

    c. Is the Grievant entitled to the reliefs sought?

Whether the Respondent is a proper party to this suit;

31. As stated herein, the Respondent filed a Notice of Preliminary Objection premised on the ground that the Claimant has purported to lift the corporate veil. According to the Respondent, the company known as Pulver Karr Limited is a separate legal entity from its management. It is the Respondent's submission that he was not the Grievant's employer. That further, all the documents relied upon by the Grievant point to Pulver Karr Limited as his employer.

32. According to the Claimant, the Respondent is acting in bad faith by denying the employment relationship with the Grievant. The Claimant further contends that the purported technicality cannot override the merits of the suit.

33. It is not in dispute that the Respondent was the Director of the company known as Pulver Karr Limited (company). This being the case, the pertinent question is whether the Respondent is a proper party to this suit.

34. The answer to this question lies in Section 2 of the *Employment Act*, 2007 which defines the term "Employer" to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

35. From the above definition, it is apparent that the Respondent is not completely distinct from the company in which he is a Director.

36. Evidently, the term Employer has been interpreted liberally in the *Employment Act* to incorporate other parties who are not strictly parties to the contract of service.

37. This position was amplified by the Court in the case of Daniel Mutisya Masesi vs Romy Madan & another [2013] eKLR, where it was determined as follows: -

> " The *Employment Act* defines the term 'employer' expansively, and does not suggest anywhere that directors cannot be joined with their corporate business vehicles in redressing employment wrongs. The Court looks at the whole economic enterprise, not the legal and business reincarnations behind the enterprise. The objection by Romy Madan, alias Rajy Madan, to being added as a Co-Respondent in the claim is rejected."

38. Applying the above determination to the instant case and bearing in mind the definition of the term "Employer" under the *Employment Act*, I return that the Respondent being a Director of the company, is a proper party to this suit.

39. To this end, the Respondent's Preliminary Objection dated 8th March 2019, is overruled.

Whether the Grievant absconded duty or was unfairly terminated from employment

40. Both parties have presented different versions with regards to this issue. On his part, the Grievant avers that he was verbally suspended from work on 15th September 2015, without being given any reasons. The Grievant further averred that he was issued with a warning letter which he refused to acknowledge as it was in reference to an offence that had occurred in June while the same was being issued in September. It was the Grievant's case that when he subsequently, reported to work, he was not allowed to sign the attendance register by his supervisor, Mr. Mathenge hence he was locked out of employment.

41. On the other hand, the Respondent denies the Grievant's assertions that he was terminated from employment. According to the Respondent, the Grievant absconded duty and only reported back to demand for his terminal dues.

42. What appears to be common cause is that the employment relationship started to go downhill on 15th September 2015. In this regard, the record reveals that the Claimant Union addressed the Respondent through its letter dated 23rd September 2015, as follows:

> " That Mr. Peter Mutua who is an active member of this trade union has lodged a complaint following a verbal suspension from the senior supervisor on 15th September, 2015.
>
> Our client has therefore informed the office that he has never been given any warning letter and he is not aware why he is out of work upto date, and no communication has been done.
>
> By means of this letter, you are requested to communicate your actual stand about the same and revert to this office within the next seven (7) days from the date herein."

43. In response, to the Claimant's letter, the company reverted through its letter dated 23rd September 2015, which reads in part:

> " As per your letter dated 23rd September 2015, Mr. Mutua has been absent from work since the 15th of September and as per the letter addressed to him on the 18th of September he had been away for more than 3 days without informing his direct supervisor and/or the office.
>
> Also please further note that when he resumed and was confronted by his immediate supervisor and our director he was very rude and actually walked away when he was being questioned.
>
> Please further note that we will settle his dues upto and including the day he last came to work and any further dues owed to him."

44. It would seem that thereafter, the Grievant was paid the sum of Kshs 4,565/= being his terminal dues. In a letter dated 23rd November 2015, the Claimant informed the Respondent that the dues were not satisfactory hence requested for a meeting. As it came to be, the meeting did not materialize.

45. In his testimony before Court, the Respondent stated that the Grievant absconded work and only reappeared demanding his terminal dues. According to him, this meant that he (Grievant) had unlawfully terminated his employment.

46. Revisiting the correspondence exchanged between the Claimant Union and the company, it is apparent from the letter dated 23rd September 2015, that it is the company that initiated the issue regarding payment of the Grievant's terminal dues.

47. It is notable that the Union through its letter dated 23rd September 2015, merely asked to know the company's stand with regards to the issues raised by the Grievant. It did not raise the issue of payment of the Grievant's terminal dues.

48. It is therefore clear that contrary to the Respondent's averments, it is the company that proposed to pay the Grievant his terminal dues without being prompted to do so.

49. Consequently, by stating that it was ready to settle the Grievant's terminal dues, the company was essentially implying that its employment relationship with him had come to an end. As the word "terminal dues" denote, payment is made at the point the employee is exiting employment.

50. If indeed the company had not terminated the Grievant from its employment, it would have indicated as much in its letter dated 23rd September 2015 as opposed to informing the Claimant that it was ready to pay the Grievant his terminal dues.

51. It is also notable that the Respondent did not indicate, let alone suggest that upon noting that the Grievant had absconded duty, it attempted to establish his whereabouts. In an employment context, it is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain his or her whereabouts.

52. On this issue, I will follow the determination in the case of Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme [2015] eKLR, where the Court determined that: -

> " ...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal."

53. In this case, the Respondent testifying under cross-examination, stated that the company attempted to call the Grievant through the phone but he was not picking up the calls. This was in sharp contrast to the Respondent's averments that the mode of communication between the company and the Grievant was in writing.

54. One therefore wonders why the company would elect to place a phone call to the Grievant upon noting his absence as opposed to inviting him in writing to show cause why disciplinary action should not be taken against him for abscondment of duty.

55. Besides, under Section 43(1) and 45 (2) (a) and (b) of the *Employment Act*, the employer bears the burden of proving the reasons for termination on the employer and failure to do so, such termination is rendered unfair.

56. Essentially, the Respondent was bound to establish that indeed, the Grievant absconded work and that it took reasonable steps to establish his whereabouts. Why didn't the Respondent, for instance, produce relevant work records to prove that the Grievant absconded work on the days it alleges he did?

57. In any event, absence from work without permission constitutes one of the grounds for summary dismissal under Section 44(4) (a) of the *Employment Act*. Hence, if indeed the Grievant was absent from work without permission, why didn't the Respondent exercise this option under the *Employment Act* and put him on notice that his employment was bound to be terminated if he failed to show cause for deserting work?

58. The bottom line is that it was not sufficient for the Respondent to allege that the Grievant absconded duty without proving the said absence or demonstrating the steps it had undertaken to ascertain his whereabouts and asked him to explain his absence from work.

59. The total sum of my consideration is that the Respondent has failed to prove that the Grievant absconded duty. If anything, the evidence on record tilts in favour of the Grievant and it is more than probable that he was unfairly terminated from employment within the meaning of Sections 43 and 45 of the *Employment Act*.

Reliefs?

60. Having found that the Grievant's termination was unfair, the Court will award him one (1) month's salary in lieu of notice and compensatory damages equivalent to six (6) months of his gross salary. This award has been informed by the length of the employment relationship and the circumstances attendant to the Grievant's exit from employment.

61. The Grievant has further sought to be paid service pay for four (4) years. Service pay is an entitlement under Section 35(5) of the *Employment Act*. Such entitlement is subject to the exclusions stipulated under Section 35(6). These exclusions include an employee who is a member of the National Social Security Fund (NSSF).

62. In this case, the Respondent stated in its Response that the Grievant was contributing to the NSSF hence is not eligible for service pay. Be that as it may, the Respondent did not exhibit the relevant employment records to prove this fact. This is further noting that under Section 10(7) of the *Employment Act*, the burden of proving or disproving an alleged term of employment stipulated in the

contract of employment shall be on the employer. There being no evidence that the Grievant fell under the exclusions stipulated under Section 35(6) of the *Employment Act*, he is entitled to service pay.

63. With regards to leave pay, the Respondent did not produce the Grievant's leave records in line with its obligation under Section 74 (1) (f) of the *Employment Act* to prove his outstanding leave days, if any. However, subject to Section 28(4) of the *Employment Act*, he is only entitled to 18 months preceding his exit from employment.

64. Turning to the issue of underpayments and unpaid house allowance, it is clear that the two claims constitute continuing injury. A continuing injury is a wrong that is not committed by a single event or breach. It is committed continuously over a period of time.

65. The limitation period in respect of a continuing injury is provided for under Section 90 of the *Employment Act*, as follows:

> [90] Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof." Underlined for emphasis

66. What this means is that, a time bar of 12 months is placed on a continuing injury, from the date of cessation of the said injury. Cessation of the injury occurs when the breach is halted for instance, upon full payment of the amounts claimed in the event the injury constituted an underpayment. Cessation can also occur when the employment relationship is terminated in the midst of the continuing injury.

67. Essentially, a claim for continuing injury should be made within 12 months upon cessation of the alleged continuing injury.

68. In the instant case, the continuing injury ceased when the employment relationship terminated. This falls around 15th September 2015, which is the time the Grievant alleges he was locked out of employment by the actions of his supervisor.

69. What this means is that time started to run from September 2015 for one year, until September 2016, whereas the suit was filed on 14th September 2018. Clearly, this was outside the stipulated time for a claim for continuing injury and as such, the claim was statute barred by the time it was filed.

70. I am fortified by the determination of the Court of Appeal in the case of G4S Security Services (K) Limited vs Joseph Kamau & 468 others [2018] eKLR, where it was held that:

> " Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

71. In light of the foregoing, the claims for underpayment and house allowance cannot be sustained.

72. The claim for one week sick off is declined as there is no evidence that the Grievant notified his employer of his illness and sought to be granted sick leave pursuant to Section 30 of the *Employment Act*. Indeed, there is no evidence that the Grievant applied for sick leave and the same was declined.

73. The salary for 15 days worked in September 2015 is also declined as the record reveals that the same was paid to the Grievant following his exit from employment.

Orders

74. To this end, Judgment is entered in favour of the Claimant and the Grievant is awarded: -

    a. One (1) month's salary in lieu of notice being Kshs 12,000.00

    b. Compensatory damages in the sum of Kshs 72,000.00 which sum is equivalent to six (6) months of his gross salary.

    c. Service pay for four (4) years being the sum of Kshs 24,000.00.

    d. Payment in lieu of leave being the sum of Kshs 12,600.00.

    e. The total award is Kshs 120, 600.00.

    f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.

75. The Respondent shall issue the Grievant with a Certificate of Service in line with Section 51 of the *Employment Act*, within 30 days from the date of this Judgment.

76. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant No appearance

For the Respondent Mr. Onyancha instructed by Mr. Mwoma

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 had 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.

STELLA RUTTO

JUDGE