



**Anzins v Chairman, Riara Valley Management (Cause 318 of 2017)
[2023] KEELRC 2787 (KLR) (7 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2787 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 318 OF 2017
JK GAKERI, J
NOVEMBER 7, 2023**

BETWEEN

TEBRA ANZINS CLAIMANT

AND

CHAIRMAN, RIARA VALLEY MANAGEMENT RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on 16th February, 2017 alleging unfair and wrongful termination of employment and non-payment of terminal dues.
2. The claim was subsequently amended on 2nd December, 2021.
3. The Claimant avers that he was employed by the Respondent on 18th December, 2009 as a cleaner at a salary of Kshs.10,900/= per month and served diligently for 7 years 9 months until 13th September, 2016 when his employment was unfairly terminated.
4. The Claimant further avers that he did not proceed on annual leave for the period he served as an employee of the Respondent.
5. The Claimant prays for;
 1. A declaration that termination of the Claimant's employment was unlawful and wrongful and be awarded Kshs.1,081,486.30.
 2. An order directing payment of terminal dues as follows;
 - a. House allowance Kshs.138,029.00
 - b. Notice pay Kshs.10,954.70
 - c. Underpayment Kshs.164,194.80



- d. Unpaid public holidays Kshs.18,975.60
- e. Long working hours Kshs.427,627.20
- f. Compensation Kshs.131,456.40
- g. Rest days Kshs.101,203.20
- h. Certificate of service
- i. Costs
- j. Interest on
- k. Any other relief as the court may deem fit.

Respondent's case

- 6. In its Reply to the Memorandum of Claim, the Respondent denies that the Claimant was its employee and avers that she was an employee of Bistar Investment Ltd who developed Riara Valley Apartments and upon handing over the apartment to the Respondent, the Claimant requested for a casual job of cleaning the compound and common arrears.
- 7. That termination by either party was one month's notice or pay in lieu of notice and the Claimant was paid a one months salary in lieu of notice.
- 8. That the Claimant was absent from work for two weeks prior to termination forcing the Respondent to hire extra assistance at its cost.
- 9. That the Claimant neither called nor notified the Respondent of her absence.
- 10. It is the Respondent's case that on termination of employment on 14th September, 2016, the Claimant was paid a salary in lieu of notice.
- 11. That the Claimant took leave on 1st August, 2016 was expected on 25th August, 2016.

Claimant's evidence

- 12. In her written statement, the Claimant testified that his salary was Kshs.10,900/=.
- 13. In her oral testimony, the Claimant testified that the contract of employment was oral and her employment was terminated on 13th September, 2016 after she had returned from leave and no termination notice was given.
- 14. The Claimant testified that she was not paid house allowance.
- 15. That she worked from 8.00 am to 5.00 pm and 8.00 am to 1.00 pm on Saturdays and did not work on Sundays and public holidays were off-days.
- 16. The witness testified that she used to proceed on leave, 20 days a year and denied having absconded duty.
- 17. It was her testimony that she was invited for a hearing but could not understand.



Respondent's evidence

18. Although the Claimant's case was concluded on 11th November, 2021, the Respondent was not ready to proceed on 17th May, 2022, 27th September, 2022, 15th March, 2023 and 23rd May, 2023 giving various reasons such as indisposition of the witness and unavailability of the witness.
19. The Respondent's case was closed on 23rd May, 2023 due to unavailability of the witness.

Claimant's submissions

20. As regards termination of the Claimant's employment, counsel submitted that it was unfair as the Respondent did not provide any reason for the decision and relied on Section 47(5) of the [Employment Act, 2007](#) to urge that the Claimant had not fundamentally breached her contractual obligations to warrant summary dismissal.
21. Counsel further submitted the Respondent had not proved that the Claimant absconded duty.
22. The holding in Boniface Mwangi V B.O.M Iyego Secondary School (2019) eKLR was relied upon to reinforce the submission.
23. On entitlement to the reliefs sought, counsel urged that the Claimant was entitled to maximum compensation for the unfair termination of employment citing the holding in Alice Njoki Mirigu V Barclays Bank of Kenya Ltd. That one month's notice pay was due under Section 36 of the [Employment Act, 2007](#).
24. Counsel submitted that unpaid leave for 8 years was uncontroverted.
25. In sum, counsel urged that the Claimant was entitled to all the reliefs sought.

Respondent's submissions

26. As to whether the Claimant is entitled to the reliefs sought, counsel submitted that the Claimant absconded duty as she did not report to work after her leave ended on 25th August, 2016 and was thus dismissed for gross misconduct in accordance with the provisions of Section 44(4)(a) and (c) of the [Employment Act, 2007](#).
27. On unpaid dues, counsel submitted that none were due as the contract of employment was oral and the Claimant did not raise the issue of house allowance and is thus estopped from raising it.
28. That the Claimant was paid Kshs.14,230/= as notice pay and did not work during public holidays or overtime.
29. That according to the attendance sheets (not on record), the Claimant worked for 6 days every week.
30. Counsel finally submitted that the Respondent was entitled to costs.

Determination

31. The issues for determination are;
 - i. Whether termination of the Claimant's employment was unfair.
 - ii. Whether the termination letter dated 13th September, 2016 discharged the Respondent from further liability.



iii. Whether the Claimant is entitled to the reliefs sought.

32. Before delving into the issues identified above, it is essential to re-state the principles applicable where a suit is undefended or where the Respondent is absent.

33. In *Humphrey Muniyithya Mutemi V Soluxe International Group of Hotels and Lodges Ltd* (2020) eKLR, Maureen Onyango J. stated as follows;

“In the case of *Monica Kanini Mutua V Al-Arafat Shopping Centre & another* (2018) eKLR, the court held that in an undefended claim, it is trite that the Claimant establishes all facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”

34. Abuodha J. expressed similar sentiments in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (2016) eKLR.

35. The foregoing sentiments are grounded on the provisions of Section 107, 108 and 109 of the *Evidence Act* which encapsulate the overriding principle that he who alleges is obligated to establish the allegations.

36. In the instant suit, although the Respondent averred that the Claimant was previously an employee of Bistar Investment Ltd and was subsequently employed by the Respondent as a casual worker, it adduced no evidence to prove when the parties agreed that the Claimant would be its cleaner and on what terms. In any case, the Respondent also averred that the Claimant’s employment was terminated when she absconded duty. This averment contradicts the averment that the Claimant was a casual employee which is a daily contract of employment.

37. Finally, the termination letter dated 13th September, 2016 is additional evidence of the employment relationship.

38. Based on the averments of the Respondent, the Claimant’s testimony and the letter of termination, the court is satisfied that the Claimant has demonstrated that there was an employment relationship between her and the Respondent.

39. As to whether termination of the Claimant’s employment was unfair, the court is guided by the provisions of the *Employment Act*, 2007 which are explicit that for a termination of employment to pass the fairness test, the employer must demonstrate that he or she or it, had;

- i. a valid and fair reason relating to the employee’s conduct, capacity or compatibility or operational requirements of the employer and
- ii. conducted the termination of employment in accordance with fair procedure.

40. The dual test was aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“ . . . For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”



41. As regards the reason for termination of the Claimant's employment, the Respondent averred and submitted that the Claimant absconded duty but adduced no evidence of the attempts it made to contact the Claimant for purposes of resuming duty, or issue a notice to show cause informing her that termination of employment was being considered for the desertion. (See *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR and *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd* (2020) eKLR).
42. Having failed to establish that the Claimant absconded duty, the Respondent failed to show that it had a justification for terminating the Claimant's employment.
43. This is clearly demonstrated by the letter of termination which makes no allegation against the Claimant.
44. As regards the procedure adopted by the Respondent, no evidence was adduced to demonstrate that the mandatory provisions of Section 41 of the *Employment Act*, 2007 were complied with as held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
45. In sum, the Respondent availed no evidence to prove that the Claimant absconded duty or that her employment was terminated in accordance with a fair procedure.
46. It is thus the finding of the court that termination of the Claimant's employment was neither substantively justifiable nor procedurally fair.
47. As regards the import of the termination letter on the liability of the Respondent, the court proceeds as follows.
48. The letter of termination of employment states in part;
- I confirm that I have received by full dues and have no claim against the company.
- Name Tebla Anzila
- ID No. xxxx
- Signature: signed
- Witness
- Name: Pius Angayia signed ID. No. 1954744
49. Surprisingly, the letter makes no reference to the dues payable or paid or the various items to be paid for.
50. The Claimant signed a plain document which neither itemised her dues nor the total amount due to her.
51. The document is signed by a Mr. Anthony Murage as Chairman-Riara Valley Management Limited (on behalf of the directors).
52. Puzzlingly, there is an addition by hand as follows;
- Sh 14,250/-
- KES fourteen thousand for hundred and fifty.
- Receipt by
53. It is unclear to the court as to what this addition meant and the Respondent availed no evidence of the circumstances in which the letter was signed and the unauthenticated addition to the letter.



54. Was the letter of termination dated 13th September, 2016 a discharge voucher or settlement agreement as well?
55. In determining this issue, the court is guided by the sentiments of the Court of Appeal in *Thomas De La Rue (K) Ltd V David Opondo Omutelema (2013) eKLR* as follows;
- “ . . . The court has, in each and every case, to make a determination if the issue is raised, whether the discharge voucher was freely and willingly executed, when the employee was seized of all the relevant information and knowledge.”
56. The court expressed similar sentiments in *Coastal Bottlers Co. Ltd V Kimathi Mithika (2018) eKLR* as follows;
- “Whether or not, a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly on the import of such a discharge/agreement; and secondly whether the same was voluntarily executed by the parties concerned . . .”
- Apart from tabulating the Respondent’s entitlements, the settlement agreement also read in part.”
57. The court is bound by these sentiments.
58. In the instant suit and as adverted to elsewhere in this judgement, the termination letter had no tabulation of the Claimant’s entitlements or the amount due to her.
59. For unexplained reasons, the Respondent chose not to commit itself in writing regarding the Claimant’s dues, which should have been a clear and forthright matter as the parties were separating.
60. A possible inference is that the Respondent was concealing essential information from the Claimant.
61. The absence of a tabulation of the Claimant’s entitlements payable to her disqualifies the termination letter from being a discharge voucher or settlement agreement.
62. The essence of any contractual relationship are its terms as they constitute the agreement which is the foundation of any contractual relationship.
63. As to whether the Claimant waived her rights to pursue further claims against the Respondent, the court returns that she did not.
64. On the reliefs sought, the court proceeds as follows;
65. Having found that termination of the Claimant’s employment was neither substantively justifiable nor procedurally fair, the Claimant is entitled to such reliefs as provided by law and proved as merited.

a. Declaration

66. Having found as above, a declaration that termination of the Claimant’s employment was unfair and unlawful is merited.



b. Payment of terminal dues

67. It is trite that a claim for special damages must be pleaded and proved as exquisitely captured by the Court of Appeal in *Hahn V Singh* (1985) 1 KLR 716 at 717 as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved . . . for they are not the direct natural and probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

68. In addition, in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd* (Supra), Abuodha J. stated as follows;

“The burden of proof does not become any less on the employee simply because the employer has not defended the claim or absent at the trial. The Claimant must still prove his or her case. It is therefore not enough for the employee to simply make allegations on oath or in the pleadings, which are not backed by any evidence and expect the court to find in his or her favour.”

69. The court is guided accordingly.

i. House allowance

70. Although housing allowance is a statutory right by dint of Section 31 of the *Employment Act*, 2007, the Claimant must demonstrate evidentiary that the salary paid was not inclusive of housing allowance for the same to be deemed merited and awarded by the court.

71. In this case, the Claimant’s written statement dated 3rd November, 2021 makes no allegation that the salary of Kshs.10,900/= was not inclusive of house allowance or that housing allowance was not paid. The prayer is declined.

ii. One month’s salary in lieu of notice

72. The Respondent tendered no evidence to demonstrate that it paid the Claimant notice pay on 13th September, 2016 when it terminated her employment.

73. Documentary evidence of payment would have shown that the Claimant was paid. The prayer is merited and is awarded.

iii. Underpayment

74. Neither the Claimant’s written statements nor her evidence in court makes reference to the alleged underpayment. It is unclear to the court as to when the underpayment commenced or how much the Claimant was entitled to as no specific evidence was adduced in this issue.

75. In the absence of supportive evidence, the prayer for payment for the underpayment is unsustainable and is accordingly declined.

iv. Unpaid public holidays

76. The Claimant adduced no scintilla of evidence to show that she worked on public holidays. Neither of two written statements on record make that allegation.



77. Relatedly, the alleged public holidays are unknown.
78. In the absence of the requisite particulars and evidence of having worked on the particular days, the prayer is unsustainable and is dismissed.

v. Long working hours

79. The prayer that the Claimant worked 2 extra hours every day she reported to work is patently unmerited for the simple reason that neither of the written statements on record reveal her reporting and exit times.
80. Relatedly, none of the statements make an allegation that she worked overtime.
The prayer is dismissed.

vi. Ungranted rest days

81. Analogous to the prayer for compensation for long working hours, the prayer for rest day is curious on account that the Claimant adduced no shred of evidence on her work week.
The prayer is dismissed.

vii. Compensation for unfair termination

82. Having found that termination of the Claimant's employment was indeed unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act, 2007*.
83. In determining the quantum of compensation, the court has taken into consideration the following;
1. The Claimant was an employee of the Respondent for about 6 years 9 months as opposed to 84 months in her two written statements on record.
 2. The Claimant had no previous record of misconduct or warning letter.
 3. The Claimant did not contribute to the termination of employment.
 4. The Claimant neither appealed the decision of the Respondent nor indicate her desire to continue in the Respondent's employment.
84. In the circumstances, the court is satisfied that the equivalent of 5 month's salary is fair, Kshs.54,500/=.

viii. Certificate of service

85. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act, 2007*.
86. In the upshot, judgement is entered in favour of the Claimant against the Respondent in the following terms;
- a. Declaration that termination of the Claimant's employment was unfair.
 - b. One month's salary in lieu of notice Kshs.10,900/=.
 - c. Equivalent of 5 months gross salary, Kshs.54,500/=.
Total Kshs.65,400/=
 - d. Certificate of service.
 - e. Costs of this suit.



f. Interest at court rates from date of judgement till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH 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 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

