



Wagongo v Embassava Sacco Society (Employment and Labour Relations Cause E2354 of 2017) [2023] KEELRC 2793 (KLR) (3 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2793 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E2354 OF 2017
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

GEORGE ONYANGO WAGONGO CLAIMANT

AND

EMBASSAVA SACCO SOCIETY RESPONDENT

JUDGMENT

Introduction

1. The claimant filed a memorandum of claim dated 27th November 2017 praying for a declaration that his termination/dismissal was unfair.
2. The claimant avers that he was employed by the respondent as a cashier from 1st April 2011 to 24th March 2017 when his services were terminated and he was being paid a salary of kshs 20,000/-.
3. The claimant states that in October 2016 he realised the respondent was not remitting his NSSF and NHIF dues and he inquired about it. He did not get a response but instead on 24th March 2017 his services were terminated.
4. He said he approached Kituo Cha Sheria who wrote a demand letter to the respondent but he did not receive a response and hence the claimant sought the remedy from court.

Respondent's case

5. The respondent filed his response dated 15th January 2018.
6. The respondent denies he was even aware of an employee/employer relationship between him and the claimant.
7. He says that since there was no employment relationship the issue of wrongful dismissal therefore does not arise and is not liable to compensate the claimant at all.



8. He prays the claimant's suit therefore be dismissed with costs.

Claimant's evidence in court

9. The claimant in his evidence on 21st March 2023 avers he was never given a contract of employment by the respondent. He says he used to receive money from drivers and cashiers on behalf of the respondent even though he was not a trained cashier.

10. Claimant says he was terminated when he asked for the NSSF and NHIF remittances.

Respondent's evidence

11. The respondent witness Mr Lukas Kyula says claimant was a cashier but was employed on need basis. They used to pay him kshs 26,000/- per month.

12. The witness says the claimant abandoned work when he was reshuffled from the main stage to the main office. He says the documents claimant produced did not have any stamps or signatures and so are not their documents.

13. The witness claims the claimant was a casual and he had no appointment letter. He says claimant did not need to be given a termination letter. Then he says claimant was not a casual worker but was a general employee.

Submissions

14. The claimant's submissions dated 21st May 2023 were considered by the court and the respondents submissions dated the 4th July 2023.

Analysis and Determination.

15. The main issues for determination were:

- (a) whether the claimant had an employer/ employee relationship with the respondent.
- (b) The other issue is whether the claimant was unlawfully terminated.

16. The claimant avers he was employed as a cashier by the respondent from 1st April 2011 to 24th March 2017. The respondent however avers the claimant was not employed as a cashier as he had no training of a cashier and did not have qualifications of a cashier. The respondent did not produce any contract of employment to prove he had employed the claimant. This is in contravention of section 9(1) a & b of the Employment Act which provides as follows:

“A contract of service-

- a. for a period or a number of working days which amount in the aggregate to the equivalent of three months or more; or
- (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.”

17. The claimant produced his job cards ranging from 2011 however and duty roaster documents as well as documents for payment of salaries from August 2016 to December 2016.



18. In the absence of any letter of appointment the claimant could only produce the available documents to demonstrate he was employed by the respondent.
19. The respondent claims that the claimant was on a fixed contract of three months. If that was the case why did he not simply give him a written fixed contract? Why did he not provide the claimant with any written letter to set out the terms of his employment. In the case no 7 of 2022 *Liechi vs Sameer Agricultural Livestock Limited (now) Devyan Food Industries Limited*. The court held:

“it is trite law the employer is obliged to issue his employee with a written employment contract. Such contract should spell out the terms and conditions of work. The employer is also obliged to explain to the employee the terms of service and cause him to sign acceptance.”
20. The court further held that section 9 of the *employment act* is not a suggestion put is coached in mandatory terms.
21. If the employer does not give a contract to the employee he takes a risk of having the terms and conditions interpreted contrary to his wishes. It is therefore crucial for the employer to give his employee a written contract.
22. In this case in the absence of any written contract and going by the documents in court the honourable court is persuaded the claimant was a service term employee under section 35 of the *Employment Act*.
23. Having held that the claimant was a service term employee the next issue is to interrogate whether the claimant was unlawfully terminated or did he desert his employment.
24. Indeed, according to sections 44(4)(9) of the *Employment Act* desertion is a grave misconduct which if proved calls for summary dismissal. It provides that if one leaves or without lawful cause absents himself from the place appointed for the performance of his work can amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause.
25. In *Ronaldo Nyambu vs Tornado Carriers Limited* Cause no 236 of 2016 the court held:

“desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal. It is however not enough for an employer to simply state an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee.
26. Also in case no 243 of 2017 *Boniface Nkubi vs Protective custody* the court said “ the claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate that there is no unfair dismissal the respondent failed to produce any evidence that the claimant deserted duty. It was only averred in the respondent’s defence which remained their allegation as correspondence alluded by the respondent demonstrating the absence of intention to resume work was not produced as evidence. In desertion it must be shown that the claimant has no intention to resume work. It is not a mere presumption. The employer must prove information of putting them on notice that termination of employment on ground of desertion was under consideration.”
27. The respondent did not tender any such evidence that the claimant deserted duty and that he had no intention to resume duty. There is no evidence that claimant was put through disciplinary process as provided in section 41 of the *employment act*. The respondent in his pleadings did not plead claimant absconded duty after he was reshuffled from the bus terminal to the main office. The defence of abscondment was only raised in the evidence in court. That seems to have been an afterthought.



28. Anyhow as already analysed above the respondent did not establish the claimant absconded from duty. Having found there is evidence the claimant was an employee of the respondent and that he was terminated unlawfully and did not abscond from duty the court proceeds to enter judgment in his favour for unfair termination.
29. The claimant is awarded the following reliefs in view of the unfair termination.
- i. One-month salary in lieu of notice kshs 26,000/-
 - ii. Leave pay for 6 years cannot be justified in law and anyway would-be time bared and is declined.
 - iii. Compensation for unfair termination at 8 months x kshs 26,000 = Kshs 208,000
 - iv. Service pay is not clarified how it is arrived at and is declined.
 - v. Costs are awarded to the claimant.
 - vi. Interest is awarded on the total award of kshs 234,000 at court rates from date of judgment till full payment.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

Anna Ngibuini Mwaure

Judge

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