



**Kenya Petroleum Oil Workers Union v Better Masaku Kenol Service Station & another
(Cause 1539 of 2018) [2023] KEELRC 3367 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1539 OF 2018
JK GAKERI, J
DECEMBER 19, 2023**

BETWEEN

KENYA PETROLEUM OIL WORKERS UNION CLAIMANT

AND

BETTER MASAKU KENOL SERVICE STATION 1ST RESPONDENT

BONIFACE MUTUNGA KALELI 2ND RESPONDENT

JUDGMENT

1. The Claimant Union commenced this suit against the Respondents on 19th November, 2018 alleging wrongful termination of the grievants employment namely; Dorcas Nthenya Musyimi, Nicholas Kyalo Muema and Noah Mutisa Mutua who were employed as follows:

Nthenya January 2009, Nicholas Kyalo January 2009 and Noah Mutua 3rd March 2015 and all were pump attendants earning Kshs.10,128/=, Kshs.10,000/= and Kshs.10,000/= per month respectively and served for 8 years for Nthenya and Kyalo and 3 years in the case of Mutua.

2. The grievants pray for;
 - a. Reinstatement to the former position without loss of earnings and benefits
 - b. In the alternative,
 - i. One month's salary in lieu of notice.
 - ii. Days worked in August or November 2017.
 - iii. Leave not taken.
 - iv. 12 months compensation.



- v. House allowance
- vi. Underpayments from 2015-2017

The total amount claimed are as follows:

Dorcas Nthenya Kshs.311,963.00

Nicholas Kyalo Kshs.442,710.00

Noah Mutua Kshs.450,188.00

Total Kshs.1,204,861.00

Respondent's case

3. The Respondent admits having employed the Claimants on temporary terms in the case of Nthenya 2011, Noah Mutisya 2011 and Nicholas Kyalo May 2017 as a casual employee.
4. It is the Respondent's case that the Claimants were petrol pump attendants and worked for 8 hours.
5. That in September 2017, Dorcas Nthenya did not report to work and a notice to show cause was issued on 31st October, 2017 but the letter was not responded to and she was invited for a hearing by letter dated 13th November, 2017 and did not appear and was summarily dismissed.
6. According to the Respondent, Noah Mutisya Mutua joined in 2011 as a casual employee and was absorbed in November 2012.
7. That on 22nd November, 2017, the employee failed to account for Kshs.21,335/= and the same was reported to the Police OB No.18/22/11/17 and he refused to appear for a hearing despite invitation by letter dated 31st November, 2017 and was summarily dismissed on 18th December, 2017.
8. In the case of Nicholas Kyalo, the Respondent states that he was employed as a casual employee in May 2017, failed to account for Kshs.16,056/= in November 2017, declined to record a statement at the Machakos Police Station, failed to appear for the hearing despite invitation and was dismissed from employment summarily.
9. The Respondent denies owing the grievants the sums tabulated and prays for dismissal of the suit with costs.

Claimant's evidence

10. Dorcas Nthenya testified that she was employed in January 2009 by Mr. Boniface Mutunga Kaleli having applied for the position and salary was paid in cash though initially the Respondent gave payslips.
11. The witness denied having deserted the workplace. It was her testimony that she was told to go away and did not receive any of the letters allegedly sent by the Respondent.
12. Nicholas Kyalo Muema confirmed that he was employed by the Respondent in January 2009, having applied for employment by word of mouth and his employment was terminated on 8th November, 2017 by the Respondent and denied having stolen any cash from the Respondent.
13. He denied having been called to the police station. He wondered who called him.
14. The witness denied having been invited for a hearing and insisted that his employment was terminated by word of mouth. The Respondent told him to go away.



15. Noah Mutisya Mutua testified that he was employed by the Respondent, Mr. Mutunga Kaleli in 2015 as a pump attendant and worked with the other grievants. That Mr. Mutunga Kaleli asked him to go away if he was tired of work having done nothing.
16. He denied having stolen cash from the Respondent or being summoned by the police and was unaware of the alleged OB Number.

Respondent's evidence

17. On cross-examination, Mr. Boniface Mutunga Kaleli confirmed that initially the grievants were casuals but were later confirmed in employment.
18. The witness admitted that the grievants served for the duration they indicated as his dates were incorrect. He admitted having lied.
19. That Nthenya and Nicholas served for 8 years while Noah served for 3 years.
20. Although the witness testified that Dorcas was employed in 2011, he had no evidence to establish that fact.
21. The witness confirmed that he used to remit National Social Security Fund deductions as evidenced by Dorcas Nthenya's NSSF statement but for September to December 2017.
22. The witness admitted that Nthenya's salary was below the minimum wage and was aware of the underpayment.
23. The witness confirmed that the grievant (Dorcas) deserted in September 2017.
24. The witness admitted that although the letters addressed to the grievant were served, he had no evidence of service nor record of attendance or hearing.
25. That there was no meeting because the grievant did not attend.
26. As regards Nicholas Kyalo, RWI testified that he had no record as to when the Claimants were employed. That Noah joined in 2011 and their salaries had risen to Kshs.13,259.30 in 2015 but were underpaid.
27. It was his testimony that the OB No. 18/22/11/2017 had no supportive evidence and he had no evidence that the letters on record were served on the grievants.
28. The witness further confirmed that he had no evidence of the hearing or attendance sheet or evidence to show that the grievants proceeded on leave or payment of house allowance.
29. That Noah Mutisya and Nicholas refused to account for monies received from customers amounting to Kshs.21,235/= and Kshs.15,016/= respectively.
30. The witness admitted having dismissed the Claimants for failing to attend the hearing.

Claimant's submissions

31. Counsel addressed three issues on termination of employment, reliefs sought and costs.
32. On the termination of employment, counsel submitted that it was unfair as the Respondent had not proved the reason for termination of the grievants' employment and thus had no justification and had not taken them through a fair process as by law required.



33. Counsel relied on the sentiments of the court in *Walter Ogal Anuro V Teachers Service Commission* (2013), *Janet Nyandiko V Kenya Commercial Bank Ltd* (2017) eKLR, cited by the Court of Appeal in *National Bank of Kenya V Samuel Nguru Mutunya* (2019) eKLR as well those in *Kenya Plantations and Agricultural Workers Union V Migotiyo Plantations Ltd* (2021) eKLR.
34. Counsel urged that Dorcas Nthenya's alleged desertion had not been established nor were the alleged fraudulent activities of Nicholas Kyalo and Noah Mutisya Mutua.
35. On entitlement to reliefs, counsel submitted that since reinstatement was unsustainable after 3 years, the alternative remedies were more relevant and the grievants were entitled to salary in lieu of notice Kshs.15,646/= as ordained by the Regulation of Wages (General) (Amendment) Orders, 2017.
36. Days worked in August and November 2017 Kshs.4,814/= for Dorcas Nthenya, leave for 3 years Kshs.37,911.00, 12 months compensation Kshs.187,752/= each, house allowance for 3 years Kshs.84,488/= each, underpayment 2015-2017 and certificate of service.

Respondent's submissions

37. Counsel for the Respondent addressed similar issues.
38. On termination, counsel submitted that Dorcas Nthenya was summarily dismissed for desertion as evidenced by the letters on record which the grievant did not respond to.
39. That Nicholas Kyalo failed to account for monies, was reported to the police, failed to honour summons and refused to attend the hearing.
40. Counsel submitted that Noah Mutisya Mutua had a similar matter as Nicholas Kyalo and followed a similar pattern.
41. As regards the reliefs sought, counsel submitted unpaid leave and underpayment were irrecoverable by reason of limitation of time as it was a continuing injury and the action was filed after 12 months period under Section 90 of the *Employment Act*, 2007 as held in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (2018) eKLR and *Trevar Marambe V For you Chinese Restaurant* (2021) eKLR as they amount to continuing injuries.
42. Counsel further submitted that Noah Mutisya Mutua deserted duty and was summarily dismissed and was not entitled to any of the reliefs sought.

Findings and determination

43. The issues for determination are:
 - i. Whether the grievants employment was unfairly terminated by the Respondent or they deserted.
 - ii. Whether the grievants are entitled to the reliefs sought.
44. As to whether the Respondent terminated the grievants employment unfairly or they absconded duty, there is no gainsaying that both the provisions of the *Employment Act*, 2007 and case law are consistent that for a termination of employment to pass the fairness test, the employer must prove that there was a valid and fair reason for the termination and it was conducted in accordance with a fair procedure,



as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows:

“ . . . for a determination to pass the fairness test, it must be shown that there was no only substantive justification for the termination but also procedural fairness . . . ”

45. The Court of Appeal expressed similar sentiments in *Naima Khamis V Oxford University Press EA Ltd* (2017) eKLR.

46. According to the Black’s Law Dictionary, 10th Edition, desertion means;

“ The wilful and unjustified abandonment of a person’s duties or obligations”.

47. In *Seabolo V Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), a South African Court sought to distinguish desertion from absence without leave as follows;

“ . . . desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to return.”

48. The Respondent alleges that Dorcas Nthenya, Nicholas Muema and Noah Mutisya Mutua deserted the work place.

49. In the case of Dorcas Nthenya from September 2017 and in the case of Noah Mutisya Mutua on or about 22nd November, 2017 after he failed to account for the sum of Kshs.21,335/= and after the matter was reported to the police. The Respondent relied on OB No. 18/22/11/2017.

50. Noah Mutisya Mutua denied the allegations and wondered who invited him to the police station to record a statement and when? It is his testimony that he was living and still lives in Machakos town and has never been arrested for the alleged offence.

51. RWI admitted that he had no details of the police OB No. or the report made to the police or evidence of the alleged call or summon to the police station.

52. To reinforce its case that Nthenya and Mutisya absconded, the Respondent produced copies of letters dated 31st October, 2017 to Nthenya, and Mutisya dated 30th November, 2017. The letter invited Noah Mutisya to a hearing on 11th December, 2017.

53. Dorcas Nthenya’s invitation for disciplinary hearing is dated 13th November, 2017. However, the letter has neither a hearing date or time nor the venue. It merely advised the grievant to “appear before the full board for your disciplinary hearing failure to which the board will proceed to determine your case, your absence benefiting.”

54. From the copies of the letters on record, it is clear that only Dorcas Nthenya was accorded the opportunity to make written representations but strangely, the letter of dismissal makes no reference to her failure to respond or attend the hearing.

55. The letter to Noah Mutisya had a hearing date and venue but no time.

56. Both grievants denied having received the letters on record and RWI admitted that he had no evidence of service. None of the letters no record is acknowledged by the alleged recipient.



57. Without verifiable evidence of service of the letters, the court has no basis on which to find that the grievants refused or failed to attend the disciplinary hearing and more so in the case of Dorcas Nthenya where the letter merely advised her to appear before the full board at an undisclosed date, time or venue.
58. Equally, the Respondent tendered no evidence to show that a disciplinary hearing took place on 11th December, 2017, in the case of Noah Mutisya's case or at any other time in the case of Dorcas Nthenya.
59. The retort by the Respondent's witness that the meetings could not proceed because the grievants did not attend cannot avail the Respondent as it filed neither the minutes of the alleged meeting nor the attendance list or membership of the committee.
60. The Respondent's witness Mr. Boniface Mutunga Kaleli could not explain when the disciplinary hearing for Dorcas Nthenya took place.
61. Nicholas Muema is accused of failing to account for Kshs.16,056/= on 22nd November, 2017 and deserted the work place after the shortage was reported to the police and he failed to write a statement and his disciplinary hearing was scheduled on the same day as that of Noah Mutisya.
62. The invitation letter dated 30th November, 2017 has no acknowledgment by the grievant and RWI adduced no evidence of service or evidence of the alleged shortage.
63. He tendered no evidence as to when and who called the grievant to record a statement at the police station or the report made to the police under OB No. 18/22/11/2017.
64. Finally, the Respondent adduced no evidence to show that a disciplinary committee meeting took place on 11th December, 2017 and resolved that the grievants employment be terminated.
65. Finally, while the summary dismissal letter allegedly sent to Dorcas Nthenya is dated 27th November, 2017, the letter to Noah Mutisya Mutua is undated save for the stamp dated 18th December, 2017 and the one to Nicholas Muema is dated 30th November, 2017.
66. Intriguingly, the summary dismissal letter allegedly sent to Nicholas Muema is dated 11 days before the alleged disciplinary committee hearing. The letter has a stamp bearing the same date which would appear to suggest that the grievants employment was terminated before the alleged hearing took place.
67. Instructively, all the Claimants alleged to have been dismissed from employment by RWI and by word of mouth and did not receive any of the letters on record including the summary dismissal letters.
68. Based on the evidence on record, it is the finding of the court that the Respondent has failed to prove on a preponderance of probabilities that the grievants or any of them absconded duty or deserted.
69. The foregoing finding is reinforced by the well settled principles of law on desertion and fair hearing as underscored in legions of decisions.
70. In *Felistas Acheha Ikatwa V Charles Peter Otieno* (2018) eKLR, Maureen Onyango J. held that;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
71. Apart from the very clean copies of letters produced by the Respondent, but whose service was unproven, the Respondent adduced no evidence to demonstrate the attempts it had made to contact any of the grievants to resume duty.



72. The court is further guided by the sentiments of the Court in *Judith Atieno Owuor V Sameer Agriculture & Livestock Ltd (2020) eKLR* as follows:

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in Section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process . . .”

73. Having found that neither the alleged desertion nor the failure to account for the monies in the case of Noah Mutisya Mutua and Nicholas Muema, and having further found that the Respondent had failed to prove that it subjected the grievants to a fair disciplinary process, the irresistible finding is that the Respondent had failed to demonstrate that it had a substantive justification for terminating the grievants’ employment or conducted it in consonance with a fair procedure.

Reliefs

74. As regards the reliefs sought, the court proceeds as follows:

Reinstatement

75. As correctly submitted by the Claimant, the remedy of reinstatement is unavailable after 3 years from the date of termination of employment or dismissal and as the grievants employment was terminated in 2017, the remedy is untenable.

76. Having found that termination of the grievants employment was unfair the reliefs, if any, available to the Claimants lie in the alternative to reinstatement.

One months salary in lieu of notice

77. As neither the provisions of Section 35 nor Section 36 of the *Employment Act*, 2007 were complied with, the grievants are awarded one (1) month’s salary in lieu of notice Kshs.14,710.45.

a. Days worked in August/November 2017

78. According to Dorcas Nthenya, employment was terminated on 31st August, 2017. The grievant, however, neither alleged nor testified that her August 2017 salary was not paid and her written statement and was testimony are silent on this prayer.

79. In sum, the alleged days in August have not been proved for the court to award.

80. While Nicholas Kyalo Muema’s employment was terminated on 8th November, 2017, Noah Mutisya was dismissed on 30th November, 2017 and none of them have evidentially established that the salary for any day in November was outstanding as neither the written statement nor the oral testimony make reference to the number of days or unpaid salary in the case of Noah Mutisya.

81. The prayer for days worked in either August of November is declined for want of proof.

c. Leave not taken

82. All the grievants testified that they did not proceed on leave during the currency of their employment and prayed for 3 years leave at 21 days per year.

83. None of the grievants alleged that the Respondent denied them leave on application.



84. This prayer is grounded on the assumption that neither of the 3 grievants was absent from the workplace for a single day for 3 years which in the court's view sounds not credible.
85. The grievants have not placed any material to show that they had any outstanding leave days.
The prayer is declined.

d. House allowance

86. From the evidence on record, it is clear that the Respondent was not paying the grievants any housing allowance. However, the court disagrees with the Respondent's counsel's submission that since the allowance accrued on a monthly basis, it constituted a continuing injury whose enforceability is limited to 12 months after cessation in accordance with Section 90 of the *Employment Act*, 2007.
87. House allowance is a statutory right under Section 31 of the *Employment Act*, 2007 and it is the duty of the employer to prove that it has paid or has been paying a housing allowance or provided housing to its employees unless the salary is consolidated.
88. In the instance case, the Respondent adduced no evidence to prove that the salary was consolidated. The Kshs.10,000/= paid to the grievants monthly could not have included a housing allowance, which the grievants are entitled to by law.
89. The court is satisfied that the Claimant has demonstrated that the grievants are entitled to house allowance at 15% of the basic pay as held in *Grain Pro Inc Kenya Ltd V Andrew Waithaka Kiragu* (2019) eKLR as follows;
- i. Dorcas Nthenya Kshs.69,075.18
 - ii. Nicholas Kyalo Kshs.69,075.18
 - iii. Noah Mutua Kshs.57,562.65
- e. Underpayment
90. The Respondent admitted on cross-examination that it was underpaying the grievants. The witness admitted that he was aware of the requirement of minimum wage.
91. The grievants are entitled to the underpaid salary.
92. Under the Regulation of Wages (General) (Amendment) Order, 2017 effective 1st May, 2017, the basic minimum salary of a petrol station pump attendant was Kshs.12,791.70 and as opposed to Kshs.15,646.00 cited by the Claimant.
93. Underpayment is assessed as follows;
- Dorcas Nthenya Kshs.100,501.2
 - Nicholas Kyalo Kshs.100,501.2
 - Noah Mutisya Kshs.83,751.00

f. Maximum compensation

94. Having found that the termination of the grievants employment was unfair, the grievants are entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
95. In determining the quantum of compensation, the court has taken into consideration the following;



- i. Whereas Dorcas Nthenya and Nicholas Kyalo served the Respondent for 8 years, Mr. Noah Mutisya was an employee for 2 ½ years, a fairly short time.
 - ii. The grievants did not contribute to the termination of employment.
 - iii. The grievants expressed their wish to continue in the Respondent’s employment by praying for the remedy of reinstatement.
 - iv. The grievants did not appeal the Respondent’s decision to dismiss them from employment.
96. In the circumstances, the court is satisfied that the equivalent of 4 months’ salary for Dorcas Nthenya and Nicholas Kyalo and 2 months for Noah Mutisya is fair, as follows;
- Dorcas Nthenya Kshs.14,710.45 x 4=58,841.8
- Nicholas Kyalo Kshs.14,710.45 x 4=58,841.8
- Noah Mutisya Kshs.14,710.45 x 2=29,420.91
97. In the end, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. One month’s notice Kshs.14,710.45.
 - b. House allowance at 15% of basic salary.
 - c. Underpayment.
 - d. Equivalent of 4 and 2 months’ salary as above.
 - e. Costs of the suit.
 - f. Interest at court rates from the date hereof till payment in full.
 - g. Certificate of service.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF DECEMBER 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

