



REPUBLIC OF KENYA



**Memba v Yducha (Employment and Labour Relations Cause 1694 of 2017)
[2023] KEELRC 3299 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1694 OF 2017
BOM MANANI, J
DECEMBER 18, 2023**

BETWEEN

FRANCIS MEMBA CLAIMANT

AND

JOEL YDUCHA RESPONDENT

JUDGMENT

Background

1. The instant dispute relates to alleged unfair termination of the Claimant's employment contract. The Claimant alleges that the Respondent terminated the contract without valid reason and in disregard of due process.
2. On the other hand, the Respondent contends that the Claimant was guilty of various infractions including absconding from duty, theft and violence at the workplace. The Respondent contends that due to these reasons, the Claimant had to be released from the workplace.

Claimant's Case

3. The Claimant avers that the Respondent employed him as a security guard and gardener at a monthly salary of Ksh. 12,000.00. It is the Claimant's case that the Respondent failed to provide him with housing or house allowance. Further, the Claimant avers that the Respondent did not allow him to take annual leave for the entire duration of the contract. As well, the Claimant contends that the Respondent used to underpay him, forced him to work for long hours without overtime pay and required him to work during public holidays and his rest days.
4. The Claimant avers that on 12th December 2016, the Respondent asked him to leave the workplace without providing a reason for the directive. It is the Claimant's case that the Respondent did not



serve him with notice to terminate the contract of service. Neither did he (the Respondent) afford the Claimant a hearing.

5. The Claimant contends that after his contract was improperly terminated, the Respondent failed to pay him terminal dues. And hence the decision to file this case. It is the Claimant's case that the Respondent's decision to terminate the contract between the parties was unlawful.

Respondent's Case

6. On his part, the Respondent concedes that the Claimant was his employee. The Respondent confirms that he, together with his wife, engaged the Claimant as a night security guard at a monthly salary of Ksh. 12,000.00.
7. The Respondent avers that contrary to the Claimant's assertion, he had been allocated a servant quarter where he was to stay whenever he elected to remain at the workplace outside his work hours. Having provided the Claimant with physical housing, it is the Respondent's case that he (the Respondent) was absolved of the responsibility of paying house allowance.
8. The Respondent denies that the Claimant was deprived of his leave days, rest days and weekends as claimed. It is the Respondent's case that the Claimant had Sundays as his off days. In addition, it is contended that the Claimant used to stay away from work during public holidays.
9. The Respondent contends that towards the end of their relation, the Claimant's character changed for worse. He allegedly begun stealing farm produce from the Respondent's garden and exhibiting violent character. The Respondent's wife contends that on the day that the Claimant was sent away from duty, he had stolen Ksh. 60,000.00 from the Respondent's car.
10. The Respondent's wife and witness asserts that when the Claimant was confronted over the matter, he became violent. He (the Claimant) threatened to inflict physical harm on the Respondent's family. According to the Respondent's wife, the Claimant picked a machete and begun chasing her around the compound.
11. The Respondent's witness states that faced with this grave danger to their personal safety and security, they called in the police to physically eject the Claimant from their midst. The Respondent's witness states that they afforded the Claimant a hearing before they terminated his contract. In her view, the Respondent complied with the law in terminating the Claimant's contract of service.
12. The witness also states that after the Claimant was released from employment, the Respondent worked out his terminal dues at Ksh. 16,000.00 and paid him. The witness stated that the Claimant was paid this amount less the loan he owed the Respondent and signed a discharge voucher.
13. The witness states that the Claimant later escalated the matter to the Ministry of Labour and was paid a further Ksh. 10,000.00. The witness states that the Claimant signed yet another release voucher at the labour office. In the Respondent's view, the Claimant's suit is an abuse of the court process and ought to be dismissed with costs.

Issues for Determination

14. Having regard to the pleadings and evidence on record, I consider the following to be the issues for determination:-
 - a. Whether the Claimant's contract of service was improperly terminated.



- b. Whether the Claimant is entitled to the reliefs that he seeks through the Memorandum of Claim.
15. On the first issue, it is a requirement of law that before the employer terminates a contract of service for an employee, he (the employer) must establish two things: the validity of the reason for the decision; and adherence to due process in processing the decision.
 16. Under sections 41 and 44 of the *Employment Act*, the employer may terminate an employee's contract of service for misconduct, physical incapacity or incompetence. However, before this decision is taken, the employer is required to notify the employee of the infraction that he is accused of in the presence of a fellow employee or a trade union representative of the employee's choice. The employer is also required to hear the employee's response to the charge.
 17. Under section 43 of the *Act*, the employer can relieve an employee of his contract if he (the employer) has reasonable grounds to believe that the employee is guilty of the infraction in question. In effect, it is not a requirement of law that the employer must have foolproof evidence of the suspected infraction before he takes action against the employee. So long as the information that he (the employer) is acting on is credible and would have led any other reasonable employer to fault the employee's conduct, the employer may take disciplinary action against the employee.
 18. In the instant case, the Respondent has accused the Claimant of stealing his arrow roots and cash. The Claimant did not deny that the Respondent's arrow roots had been taken without his (the Respondent's) consent. However, he sought to shift blame for the infraction to the house help.
 19. With evidence that his crop was being unlawfully harvested, the Respondent had valid grounds to suspect that the Claimant had a hand in the malpractice. First, as the gardener in charge of the crop, the Claimant was expected to take care of and report any interference with it. Second, the Claimant was employed to provide security services in the compound where the crop was stolen from. Inevitably, the Respondent expected him to account for the loss.
 20. In my view, the Claimant's conduct fell within the purview of acts of gross misconduct in terms of section 44 of the *Employment Act*. There was credible basis for the Respondent to entertain reasonable suspicion that the Claimant was behind the mischief of stealing the farm products. I therefore reach the conclusion that the Respondent had valid reason to consider terminating the Claimant's contract of service.
 21. Away from the foregoing, the law also requires the employer to afford the employee a hearing before the decision to terminate his contract is arrived at. The Claimant states that the Respondent did not afford him this opportunity. On the other hand the Respondent's witness told the court that they called the Claimant for a session before they released him from employment.
 22. It is noteworthy that on the day that the Claimant was relieved of his duties, the Respondent's witness states that he had been overly violent and had been chasing them around with a machete. The witness stated that they (the Respondent's family) had to call in the police to eject the Claimant from the home.
 23. With this evidence, it is incredible that the same witness would still suggest that before the Claimant was sent away, they convened a session with him and conducted a disciplinary hearing. It is very unlikely that the parties would have held such a session if indeed the Claimant had become as violent as was suggested.
 24. Having regard to the foregoing, I am inclined to believe the Claimant's assertion that the Respondent did not afford him a hearing before his contract was terminated contrary to the requirements of section 41 of the *Employment Act*. I am inclined to believe the Claimant's word that there was no disciplinary



session that was convened at which he was given the chance to react to the accusations against him. In the premises, I reach the conclusion that the Respondent did not uphold due process in releasing the Claimant from employment.

25. The next question to determine relates to whether the Claimant is entitled to the reliefs that he seeks in the Memorandum of Claim. Ordinarily, once the court declares the employer's decision to terminate a contract of service irregular, it would grant the employee some relief under section 49 of the *Employment Act*. However, the court has discretion to decline to award these remedies depending on the circumstances of each case.
26. In the instant case, it is the Respondent's case that after the parties separated, the Claimant was paid Ksh. 16,000.00 less a loan deduction of Ksh. 3,000.00 to cover his terminal dues. The Respondent's witness stated that the Claimant signed an acknowledgement dated 15th December 2016 in which he confirmed that he had no further claim against the Respondent. The document was tendered in evidence.
27. The defense witness further testified that shortly after the Claimant had received the above payments, he proceeded to the Ministry of Labour to press for more payments. The Ministry summoned the Respondent to a meeting where it was agreed that the Claimant be paid a further Ksh. 10,000.00.
28. It is the defense case that they paid this money and the Claimant yet again, signed another release voucher dated 15th March 2017. This document was also tendered in evidence.
29. The Respondent avers that with this second payment, he thought that the matter had been closed. However, this was not to be. He was soon served with summons to appear before court over the same issue.
30. When the Claimant was confronted with these assertions, he initially denied that he had been paid any money or signed any documents as claimed by the Respondent. As a matter of fact, when the Respondent moved the court to strike out the suit for being an abuse of the court process, the Claimant swore a replying affidavit in which he denied ever entering into an agreement with the Respondent to settle the dispute upon payment of Ksh.10,000.00.
31. However, during cross examination, the Claimant changed his position on the matter. He initially admitted having signed some documents but denied knowledge of their content. When the two vouchers were shown to him, he admitted having signed them in exchange for the payments aforesaid.
32. I have looked at the two instruments. They clearly indicate that the Claimant gave the Respondent an assurance that upon receiving the money in the instruments, he would have no further claims against him (the Respondent).
33. With this assurance, it is incredible that the Claimant would turn around and sue the Respondent for further payments. Such conduct amounts to abuse of the court process.
34. The legal position is that a release voucher that is freely executed between parties constitutes a contract between them. It is binding on them unless it is set aside on the usual grounds that would be invoked to set aside a contract (*Ronald Kipngeno Bii v Unliver Tea Kenya Limited* [2022] eKLR).
35. The Claimant did not apply to set aside the release vouchers. Rather, his initial strategy was to disown the instruments in their entirety only to later admit having signed them.
36. Once parties execute a release voucher closing a matter, the court will not (except in limited circumstances) reopen the matter in order to reconsider the question of compensation. In the premises,



I arrive at the conclusion that in the circumstances of this case, there is no justification to overlook the release vouchers on record and reopen the question of compensation to the Claimant.

Determination

- 37. Based on the evidence on record, the court finds that the decision to terminate the Claimant's contract of service was procedurally flawed. It is so declared.
- 38. However, in view of the fact that the parties agreed on the mode of compensation and signed release vouchers before this action was brought to court, the court declines to reopen the question of compensation to the Claimant.
- 39. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

