



REPUBLIC OF KENYA



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Nyang'ate v Platinum Outsourcing And Logistics{E.A.] Limited (Cause 303 of 2015) [2022] KEELRC 1641 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1641 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 303 OF 2015**

J RIKA, J

MAY 27, 2022

BETWEEN

STEPHEN MANG'ERA NYANG'ATE CLAIMANT

AND

**PLATINUM OUTSOURCING ANDCND LOGISTICS{E.A.]
LIMITED RESPONDENT**

JUDGMENT

1. The claimant filed his Statement of Claim on March 4, 2015.
2. He states, he was employed by the respondent on January 3, 2011 as a Cleaner.
3. His salary was Kshs. 8,400 which he claims, was below the minimum wage for Cleaners in Nairobi, at Kshs. 9,780 monthly, as per the Wages Order of 2013.
4. He was granted permission by his Supervisor Irungu, on July 8, 2014, to take his Mother to hospital. He returned to work on July 18, 2014.
5. On July 18, 2014, he was confronted by the Transport Manager Alex, who ordered him to remove his work overall, and get out of the respondent's premises. He was advised, there was no more work. He returned to the premises on July 21, 2014, when Irungu confiscated his work identity card. Irungu told the claimant to never return to the premises.
6. The claimant holds that the respondent terminated his contract. Termination was without just cause and notice. It was unfair and unlawful. He prays for Judgment against the respondent for: -
 - a. 1- month salary in lieu of notice at Kshs. 9,780.
 - b. Annual leave for 2011 and 2012 at Kshs. 19,561.
 - c. Pro-rata annual leave of 6 months, in 2014 at Kshs. 4,890.



- d. Gratuity at 15 days for 3 years completed in service at Kshs. 14,671.
 - e. Salary underpayment for 3 years and 6 months added up at Kshs. 57,999.
 - f. 12 months' salary in compensation for unfair termination at Kshs. 117,371.
Total...Kshs. 224,276.
 - g. Declaration that termination was unfair and unlawful.
 - h. Declaration that the Claimant is entitled to terminal dues and compensation.
 - i. Costs and interest.
7. The respondent filed its Statement of response on April 2, 2015. It is conceded that the claimant was employed by the respondent as a Cleaner, on a monthly salary of Kshs. 8,400. He was not underpaid. He worked at Thika where the applicable rate was a minimum of Kshs. 6,999 monthly.
 8. At no time was he granted leave to attend to his ailing Mother. He absconded, on July 8, 2014 and purported to return on July 18, 2014. This amounted to an act of gross misconduct, under section 44 [4] of the Employment Act, warranting summary dismissal. He is not entitled to notice or compensation. He was actively registered under N.S.S.F, and does not merit gratuity. He was paid all his salary, including for the month of July 2014. The Respondent prays for dismissal of the Claim, with costs.
 9. The claimant, respondent's Operations Coordinator Alex Nordix, Supervisor Thomas Irungu, and Human Resource Manager Alvin Mokaya, all testified for the respective Parties on December 15, 2021, when hearing closed. The matter was last mentioned in court on February 15, 2022, when Parties confirmed filing of their Final Arguments.
 10. The claimant adopted his Witness Statement and Documents in his evidence before the Court. His Witness Statement is a re-run of the Statement of Claim, as summarized above. He emphasized that he was granted permission to go and attend to his mother. He was advised by Irungu that he could fill the leave form on return, but was instead ejected on return. He did not desert.
 11. Cross-examined, he told the court that he worked at Chania, in Thika. The work identity card states, his place of work was Chania. His salary was Kshs. 8,400 monthly. It is captured in the pay slip at a monthly gross of Kshs. 9,300. The claimant insisted he was underpaid. He did not know about Wage Orders. Bank Statements show Chania Cleaning Services paid the claimant. The muster roll indicates the claimant was absent in July 2014. The claimant did not fill the leave form, when he went to attend to his Mother. There is no document to show that the claimant's mother was sick. He was away for 10 days. He was asked to surrender the work overall by Alex. Irungu took away the work identity card. The Claimant last worked on 8th July 2014. He was paid salary for July at Kshs. 8,400. On redirection, the claimant restated that he was underpaid, and that he was an Employee of the Respondent until July 21, 2014.
 12. Alex adopted his Witness Statement and Documents filed by the Respondent. Cross-examined, he stated that the claimant absconded. He was not aware that the claimant had gone to see his Mother, after he the respondent granted him leave. There were efforts made by the Human Resource Office to reach the claimant. He was not willing to return. He was not at work on July 21, 2014. His last day at work was June 30, 2014.
 13. Irungu adopted his Witness Statement. He told the court on cross-examination that he did not grant the claimant leave on July 8, 2014. It is not true that he gave leave verbally, with instructions it would



- be documented upon the claimant's return. Employees signed the muster roll each morning. Irungu did not have evidence, showing he reached out to the claimant. He did not report abscondment, to the Labour Office. The claimant did not avail himself to be taken through a disciplinary hearing.
14. Mokaya, like his colleagues, adopted his Witness Statement. Cross-examined, he told the court that he was employed in December 2016. The muster roll shows that the claimant was not at work from July 8, 2014. There was no record of him having obtained leave to attend to his Mother. His Supervisor called him after abscondment. There was no answer. No letter to show cause, or report to the Labour Office, ensued.
 15. The issues are whether the claimant's contract was terminated by the respondent fairly or at all; and whether he merits the remedies sought.

The Court Finds: -

16. There is no dispute that the claimant was employed by the respondent as a Cleaner between January 3, 2011 and July 8, 2014, when he was last actively at work.
17. He worked at Chania, in Thika and not in Nairobi. The minimum monthly wage applicable for all Municipalities, Mavoko, Ruiru and Limuru Town Councils, for Cleaners was Kshs. 9,024. Kshs. 9,780 pleaded by the claimant, applied to Nairobi, Mombasa and Kisumu Cities. This was in the Wage Amendment Order of 2013.
18. The claimant adopts a uniform minimum wage of Kshs. 9,780, over a period of 3 years and 6 months. He does not state what was the minimum wage applicable to Thika, in 2011 and 2012, and whether he was paid in accordance with the applicable minimum wage.
19. His pay slips for April-July 2014 show that he received Kshs. 9,023 which is just Kshs. 1.00, shy of the applicable rate of Kshs. 9,024. There are no pay slips on record for other months. He is granted underpayment of salary for the period April- July 2014 at Kshs. 4.00.
20. He was subscribed to the N.S.S.F actively, as shown in the same pay slips. He does not merit gratuity.
21. He pleads for annual leave for the period 2011 and 2012. None of the Witnesses presented by the Respondent said anything of this prayer. No annual leave records were exhibited by the Respondent to contradict the Claimant. Section 74 [1] [f] of the *Employment Act*, requires Employers to retain record of Employees annual leave record. In event of a dispute on leave entitlement, such records ought to be availed to the Court by their custodians. He is allowed the minimum statutory annual leave days of 21 days each year [42 days], based on his monthly salary of Kshs. 9,024, at Kshs. 14,577.
22. Pro-rata annual leave for 6 months, based on the formula above, for the year 2014, is granted at Kshs. 3,644.
23. The claimant left on July 8, 2014, and returned on July 18, 2014. The respondent concedes at paragraph 4 of its Statement of Response, that the claimant 'purported' to return on July 18, 2014. The claimant cannot have left without return, deserted or absconded, on July 8, 2014.
24. He returned on July 18, 2014, and the court agrees with him, was advised there was no more work. He showed up again on July 21, 2014 and the respondent confiscated his work identity card and work overall. He therefore left employment altogether, on July 21, 2014. The respondent in fact considered the claimant to have been its Employee up the end of July 2014. Alex told the court that the claimant left on July 30, 2014. He was paid his full salary for July 2014, notwithstanding that he last worked on July 8, 2014.



25. He did not establish that he had the leave of the respondent, when he left on July 8, 2014. He did not exhibit any letter seeking leave, or any form authorizing leave. His explanation that leave was arranged by word of mouth, is not something the court can accept, considering the claimant's supervisor disavowed such verbal transactions. The claimant did not make an effort to demonstrate that indeed his Mother was ailing. Had he done so, it could perhaps have been argued, that he left his workplace without the leave of the Respondent, but with other lawful cause. The court is satisfied that the claimant absented himself from the place appointed for the performance of his work, without leave of the respondent, or other lawful cause, which is an employment offence under section 44[4][a] of the *Employment Act*, warranting summary dismissal.
26. The prayer for notice pay is declined.
27. The claimant availed himself at the workplace on July 18, 2014 and July 21, 2014. The respondent did not convene a disciplinary hearing. It did not issue the claimant a letter to show cause why, he should not be disciplined for his 10- day absence. He was not invited to a disciplinary hearing. The respondent simply confiscated his work identity card and apparel. Procedure was flawed.
28. Termination was unfair on account of procedure.
29. The claimant worked for 3 ½ years. He was entirely to blame for termination, having chosen to travel home, allegedly attend to his Mother without the express leave of the respondent. He is allowed compensation for unfair termination, equivalent of 1-month salary at Kshs. 9,024.
30. No order on the costs.
31. Interest granted at court rates, from the date of Judgment till payment is made in full.

In Sum, it is Ordered:

- a. It is declared that termination was unfair, on account of procedure.
- b. The respondent shall pay to the claimant: underpayment of salary at Kshs. 4,000; annual leave at Kshs. 14,577; pro-rata annual leave at Kshs. 3,644; and compensation equivalent of 1- month salary at Kshs. 9,024 – total Kshs. 27,249.
- c. No order on the costs.
- d. Interest allowed at court rates, from the date of Judgment till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

