



**Mirikau v Exon Investments Limited (Cause E002 of 2021)  
[2022] KEELRC 1441 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1441 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE E002 OF 2021**

**JW KELI, J  
MAY 26, 2022**

**BETWEEN**

**ABISAI MAKONJO MIRIKAU ..... CLAIMANT**

**AND**

**EXON INVESTMENTS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant upon summary dismissal from service by the Respondent through the Law Firm of JS Khakula & Company Advocates filed a Memorandum of Claim dated March 29, 2021 seeking the following reliefs:-
  - (a) A declaration that the termination of Claimant's employment was unlawful and unfair.
  - (b) An order for the Respondent to pay the Claimant his terminal benefits and compensatory damages as pleaded per paragraph 12 of the claim .
  - (c) Interest on (b) above at court rates.
  - (d) Costs of the this suit
  - (e) Any other relief that this Honourable court may deem fit and just to grant.
2. In addition the Claimant filed in court Claimant's list of documents dated March 29, 2021 and the bundle of documents, Claimant's witness statement filed in court on April 6, 2021.
3. The Respondent entered appearance and filed statement of response dated May 4, 2021 received in court on the May 6, 2021 with witness statement of Susan Riziki Nyale and Respondent's list of documents dated May 4, 2021 together with the bundle of documents and statement of Godfrey Nyambu dated December 21, 2021 received in court on December 21, 2021.



## **The hearing**

4. The Claimant's case was heard on the December 11, 2021 where the Claimant testified under oath and was cross-examined by counsel for the Respondent, Mr Anwar. The Claimant was the only witness of fact in his case. The Claimant's closed his case that day.
5. The Respondent's case was heard on the January 18, 2022 with the Respondent calling one witness of fact Godfrey Nyambu who gave evidence on oath and was cross-examined by counsel for the Claimant Mr Kapuka for JS Khakula & Co Advocates. The defence closed their case on that day.
6. The parties filed written submissions after the hearing. The Claimant's submissions are dated February 16, 2022 drawn by J.S Khakula & Company Advocates and received in court on the February 18, 2022. The Respondent's written submissions are dated March 7, 2022, drawn by Anwar & Company Advocates and received in court on the March 8, 2022.

## **Claimant's Case in summary**

7. The Claimant's case is that he was a former employee of the Respondent as a mechanic manager at the Bungoma Base with his duties being to attend to the Respondent's vehicles plying Mombasa, Uganda, Rwanda, Sudan route. His gross salary was Ksh.28,857/- per month and he was not paid leave or overtime allowances. That he was injured on April 5, 2018 when Repairing Respondents' motor vehicle Registration No. KCB 895G Mercedes Actros at Kanduyi Bungoma and got a fracture on his ankle and was on plaster for 3 months. The Respondent had no medical cover and he paid for all the medical expenses. That during the period of his convalescence the Respondent continued to pay his salary but posted another person to carry out his duties who he alleges was not conversant with the work and he had to stay around to advise and direct him. That he resumed work when he was well. That in December, he was informed by the Respondent's Human Resources Manager that his employment had been terminated. That no explanation was given to him why he was terminated.
8. He was not paid his salary for December and for the injury sustained. He claims that for the 3 and ½ years of service he worked for long hours did not take leave and was not paid any extra remuneration. He seeks compensation as per claim

## **Respondent's Case in summary**

9. The Respondent Admits that the Claimant was their former employee from January 5, 2017 having applied for mechanic work on September 16, 2016 and earned salary of kshs. 25,000/- net. That he was stationed at Bungoma and sometimes on November 26, 2018 the Claimant was issued with transfer letter to Mombasa whereof he declined to receive the letter and thereafter deserted work. That the Claimant did not move and report to Mombasa or work after transfer at Bungoma as another mechanic had been posted there. The Claimant absented himself from work for 12 days without reason leaving the Company with no option but to summarily dismiss him from employment a fact that was communicated to the Claimant on December 17, 2018 and copied to Mombasa labour office.
10. The Respondent denies wrongful deductions and denies the Claimant was injured in the cause of defendant's work. It also denies the claim that Claimant worked overtime and states the Claimant took leave for the 2 years he was working with the company. The Claimant having deserted duty is not entitled to Notice or December salary as he stopped working on November 26, 2018.



## **Undisputed facts**

11. The Claimant was an employee of the Respondent based at Bungoma as a mechanic and was summarily dismissed from employment.

## **Determination**

### **Issues for determination**

12. The Claimant in his Memorandum of Claim identified the following issues in dispute.
  - (a) Unfair termination of services
  - (b) Unfair labour practice
  - (c) Non -payment of terminal dues
  - (d) Insufficient compensation for work injury.
13. The Respondent in their submissions identified the following issued in dispute for determination:-
  - (a) Whether the Claimant herein was unlawfully terminated from employment.
  - (b) Whether the Claimant is entitled to terminal benefits.
  - (c) Whether the Claimant is entitled to damages for work related and whether the court has jurisdiction to deal with the issue.
  - (d) Whether there were wrongful deductions.
  - (e) Whether the Claimant's claim has merit and what orders should thus be granted.
14. The court considered the issues identified by the parties in the dispute and having heard the case was of the considered opinion that all the issues were relevant and determines the issues in disputed for conclusive determination of the dispute as follows:-
  - (a) Whether the termination of employment services of the Claimant by the Respondent was unlawful and unfair,
  - (b) Whether the court has jurisdiction to determine the claim for work related injuries,
  - (c) If the court has jurisdiction,
  - (d) Whether the Claimant is entitled to damages for work related injury, and
  - (e) Whether the Claimant is entitled to reliefs sought.

### **Whether the termination of the Employment services of the Claimant by the Respondent was unlawful and unfair.**

15. The Claimant submits that his termination from employment of the Respondent was communicated verbally on December 21, 2018 as stated in his witness statement in paragraph 10 and 11.
16. During cross-examination the Claimant confirmed that on the November 26, 2018 he was working at Bungoma, he denied receipt of transfer letter to Mombasa and to handover to Japheth Ouma, the Claimant confirmed the date on the letter was November 26, 2018 ('DMF2') and the letter was addressed to him at the bottom the letter read "declined to acknowledge". The Claimant denied



receipt of the letter and asked the defence counsel to inform him of the name of the person who gave him the letter. The Claimant denied receipt of call from Mombasa labour office on deserting duty. The Claimant said he called the Mombasa office and was informed he had been replaced and should handover to Japheth Ouma. The Claimant was silent when asked whether that was same person mentioned in the transfer letter. The Claimant confirmed that the letter dated December 17, 2018 stated reason for the dismissal to be absenteeism ( DMF 3). The Claimant told the court at his place of work there was no signing on attendance to duty, confirmed he was not a manager but mechanic , confirmed Japheth Ouma was from Mombasa and a mechanic but stated he was not informed the said Ouma was to replace him.

17. The burden of proof of reasons for termination lies with the employer under Section 43 of the *Employment Act*. Section 43 ( 2) reads:-

“the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.” Section 44 (4) (a) of the same Act provides it is lawful for employee to be dismissed from employment, “ If without leave or other lawful cause an employee absents himself from work place appointed for the performance of his work.”

18. RW during cross examination told the court he personally delivered the transfer letter dated November 26, 2018 to the Claimant sometimes end of November. That he found him at Kanduyi. He called him and served him with the letter. The witness on cross-examination told the court the Claimant deserted work from 5<sup>th</sup> December and they served letter of desertion after about 20 days of him missing at work.

19. The court having heard the two parties’ evidence finds that Japheth Ouma was posted as a mechanic on November 26, 2018 same time as the date of letter of transfer which RW said he delivered to the Claimant personally sometimes end of November. The letter is simply written “declined to acknowledge”. The Respondent’s witness appeared credible on the delivery of the letter of transfer. This position is supported by the Claimant’s testimony that he was the only mechanic at Bungoma and in November Japheth Ouma reported as a mechanic the same person stated to be his replacement in the letter dated November 26, 2018.

20. The letter of desertion dated December 17, 2018 is stamped at County Labour office at Mombasa of which receipt was denied by the Claimant.

21. The Claimant in paragraph 10 of his statement states when he was well he resumed work. That in December he was informed by the Human Resource Manager that his employment was terminated. In his claim paragraph 9 it is stated on December 21, 2018 the Claimant was verbally informed by the Respondent’s Human Resource Manager that his employment had been terminated.

22. The court deduces that the Claimant was away and resumed duty on December 21, 2018 to find his services had been terminated. He must have seen his letter of dismissal prompting his call to the Human Resource Manager. The Claimant was not candid in his evidence taking advantage of the nature of his work of being alone at the station and the lack of attendance register.

23. The court finds and determines the reason of absenteeism from duty as stated in the letter dated December 17, 2018 to have been proved. The reason of desertion of work was valid and existed.



### **Whether the termination was procedurally fair.**

24. Section 41 of the [Employment Act](#) provides for the procedure to be complied by employer before termination of employment as follows: “an employer shall before terminating the employment of an employee on the grounds of misconduct poor performance or physical incapacity explain the employee in a language the employee understand, the reason for which the employer is considering termination and the employer shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”
25. The Claimant in the instant case was summarily dismissed for absenteeism/desertion of duty. Then Section 41 (2) applies which reads: -“An employer shall, before terminating the employment of an employee under Section 44 ( 3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person if any, chosen by the employee within subsection (1) make.”
26. The Respondent relies on the letter of desertion of employment dated December 17, 2018. The letter refers to a show cause letter which was not produced. The letter states the Claimant’s services are no longer required by the company.
27. The Claimant submits that even if the transfer letter and the dismissal letter had been served, Section 35 (1) (c) of the [Employment Act](#) requires a notice of at least 28 days in writing. No such notice was served. Section 30 of the [Act](#) provides for payment in lieu of notice which was not paid.
28. The court finds and determines there was no procedural fairness in the termination of the Employment of the Claimant under Section 41 (2) of the [Act](#). The Claimant was entitled to that procedural fairness even if the reason for termination of his employment services existed.
29. The court agrees with the submissions of the Claimant that he was entitled to Notice or payment in lieu. There was no notice issued under Section 35 (1) ( c) for 28 days. Section 35 (4) (b) reads “ Nothing in this section affects the right of an employees to terminate a contract of employment without notice for any cause recognized by law.”
30. The court finds no notice of termination was issued and no procedural fairness. The Court finds that the Respondent should pay Notice Pay to the Claimant equivalent of one month’s gross salary. The court determines further the Claimant was not afforded procedural fairness which is a mandatory provision of the law. Taking into consideration the court found that the Claimant deserted duty a ground for summary dismissal, the Court determines that compensation to issue for one-month gross salary for unfair termination is sufficient.

### **Whether the Court has jurisdiction to determine the Claim for work injury Claim.**

31. The Claimant did not submit on the jurisdiction of the court on the work injury claim. The Respondent submits the court does not have jurisdiction to entertain such a claim under its original jurisdiction being exercised in the instant suit. That workman injury claim can only be handled originally by the Director under [work injury Benefits Act](#) and the court can only exercise appellate jurisdiction on the decision of the director and relies on the provisions of section 52 of the [Work Injury Benefits Act](#) and the decision of Justice Makau in [Paul Mututbii Mulwa v Board of Management Mbooni Boys High School](#) ( 2020 ) eKLR where when filed with a similar invite to award compensation for a work injury Claim held as this “...29. Therefore I agree with Rika J in [Saidi Mohammed v Diamond Industries Limited](#) ( 2018) eKLR where he held that this court enjoys only appellate jurisdiction over WIBA compensation claims and not primary jurisdiction. Consequently, I must at



this juncture down my tools over the claim founded on WIBA for want of jurisdiction and refer it to the relevant forum under WIBA.....”. This court is persuaded by the forgoing decisions of its Brothers. The court notes that the Claim for damages for work injury claims must be assessed based on doctor’s reports and supporting documents and hence the instant suit is not proper place for the claim to be determined.

32. The court having upheld the decisions of Justice Anaheim and Rika J above, the court finds it has no jurisdiction over WIBA claims and refers the claim for work injury benefits to the Director WIBA being the relevant forum.

#### **Whether the Claimant is entitled to reliefs sought.**

- a. Terminal benefits
33. The Claimant submits that Section 35 (5) of the Employment Act provides for Service pay for every year worked and claims the same.
34. The Respondent submits that the Claimant was under NSSF hence not entitled to Service pay under Section 35 (b) (d) of the Employment Act and relies on Defence Exhibit (1) being copy of the Claimant’s personal file and the pay slip (Claimant exhibit 3).
35. The court finds that Section 35 (5) provides for payment of Service Pay for every year worked but under 35 (6) (d) the service pay is not payable where the employee was on the National Social Security Fund. The Claimant produced ( exhibit 3 ) his pay slip which indicate he was deducted Kshs. 200 for NSSF.
36. The court finds and determines he is thus not entitled to service pay.

#### **Claim for wrongful deductions.**

37. The Claimant claimed he was deducted the total sum of kshs.28,578/- for the month of February, June, July, August and November 2017.
38. During cross-examination RW admitted the Respondent paid the Claimant’s salary through the bank. On being referred to the bank statements ( Claimant exhibit No. 4 ), RW told the court that what was reflected in the bank statement was the net salary and said advance salary was paid via Mpesa. RW told the court the Claimant was issued with advance via Mpesa. RW admitted that he did not mention in his statement that the Claimant received advance via Mpesa.
39. The Respondent submits that the claim is an afterthought as the alleged deductions occurred in 2017 and the Claimant failed to complain only to raise issue in the suit. That further the Claimant did not file the pay slips for the months of alleged deductions which would have reflected the advance payment. That on failure to produce the pay slip the court should make adverse inference under Section 112 of the Evident Act.
40. The Claimant pleaded the wrongful deductions specifying the months of wrongful deductions and served upon the Respondent with his bank statements where his salary was paid. The Respondent had opportunity to respond and justify the deductions by the alleged Mpesa statements but failed to do so.
41. The court was invited to make adverse inference against the Claimant for failing to produce the pay slips for the alleged period. The court thinks that is not the position of the employment law. The employer under Section 74 of the Employment Act is the custodian of all records including those payslips. Under Section 47(5) the burden of justifying action lies with the employer once the Claimant states it occurred and demonstrates how it occurred. In the instant suit the Claimant demonstrated



the deductions occurred by producing his bank statements showing payment of salary less than the admitted net salary of kshs. 25,000/-.

42. The court finds the burden shifted to the employer who failed to justify the deductions by producing record of the payment of the claimant's salary. The court finds and determines there was wrongful unjustified deductions of Claimant's salary of kshs. 28,578/-. The Respondent to pay the wrongful deduction of kshs. 28,578/- to the Claimant.

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

a. Claim for Notice pay

43. The employment contract was not produced. The Claimant is awarded the statutory Notice Pay 28 days which court finds to be the equivalent of one month's gross salary at Ksh. 28,857/-.

b. Claim for December 2018 salary

44. The court finds that the Claimant is only entitled to salary for days worked. The Claimant admitted he was informed of termination of his services on December 21, 2018. The Respondent produced the letter of termination dated December 17, 2018 and stamped by the county Labour office Mombasa on December 17, 2018. The Claimant is entitled to payment of salary upto the date of letter of desertion hence payment of salary for 17 days for December 2018. Thus  $17/30 \times 28,857 = 16,352.30/-$ . Salary for days in service in December 2018 is awarded at Kshs. 16,352.30/-.

c. Claim for Wrongful deductions.

45. The Court has already made findings there was kshs. 28,578 and the same is awarded.

d. Claim for Overtime and off not paid.

46. There was no prove of overtime and off by Claimant. During cross examination the Claimant told the court that he worked overtime as he worked day and night. That he could not explain the times. He said he was alone and no off days. The Claimant confirmed there was no attendance register to sign when he was at work. The Claim is not proved and is dismissed.

e. On claim for leave pay for 4 years @Kshs.25,000/- .

47. the Respondent again had the burden to produce in court the record of leave of the Claimant. This is a claim falling under Section 90 of the *Employment Act* which limits cases of continuing injury to twelve months next after cessation thereof. The Claimant is thus only entitled to statutory leave for the year of termination of service. The parties did not produce the employment contract of the Claimant on days he was entitled to leave. The Claimant is thus only entitled to 21 days statutory leave under Section 28 (1) (a) of the *Employment Act*. The Claimant is awarded statutory leave of 21 days payment in lieu thus  $21/30 \times 28,857 = 20,200/-$ . The Respondent to pay Kshs.20,200/- in lieu of annual leave.

**Conclusion and disposition**

48. The court found that the termination of the employment of the Claimant by the Respondent was unfair for lack of procedural fairness . Judgement is entered for the Claimant as follows:-

- (a) Compensation for unlawful termination the equivalent of 1 month's gross salary sum of kshs. 28,857/-.
- (b) Notice pay for 1 month is awarded for the sum of Kshs. 28,857/-.



- (c) The Claimant is awarded unpaid salary for 17 days for December 2018 for the sum of Kshs.16,352.30
- (d) The Respondent to refund to the Claimant wrongful deductions for the sum of Kshs. 28,578/-
- (e) The Claimant is awarded payment in lieu of annual leave of 21 days for the sum of Kshs. 20,200/-.  
(The total sum of 1-5 being Kshs.122,844.30/- to be paid subject to statutory deductions).
- (f) The court refers the claim for work injury to the Director of WIBA for assessment under the WIBA Act .
- (g) The Respondent to issue the Claimant with Certificate of Service pursuant to the provision of Section 51 of the Employment Act.

49. The Respondent to pay Claimant costs of the suit.

50. Interest is awarded on the award sum at court rates from date of judgment until payment in full.

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF MAY 2022.**

**J. W KELI,**

**JUDGE.**

**In the Presence of :-**

**Court Assistant : Brenda Wesonga**

**Claimant: Shukhu Advocate h/b Khakula Advocate**

**Respondent:- Ms. Natwati h/b for Anwar Advocate**

