



REPUBLIC OF KENYA



**Arasa & another v Benori Agencies and Services Limited. (Cause
242 of 2017) [2022] KEELRC 116 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 242 OF 2017
JK GAKERI, J
MAY 17, 2022**

BETWEEN

DANIEL OSEKO ARASA 1ST CLAIMANT

MIKE DENIS ONGERI 2ND CLAIMANT

AND

BENORI AGENCIES AND SERVICES LIMITED. RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by memorandum of claim dated 31st January 2017 and filed on 9th February 2017, alleging unfair dismissal from employment.
2. The Claimants prays for various reliefs as follows:-
Daniel Oseko Arasa
 - i. One month's salary in lieu of notice Kshs.19,906.50
 - ii. House allowance for 2015 and 2016 Kshs.41,541.00
 - iii. 12 months' compensation Kshs.238,878.00Total Kshs.309,273.50
Mike Denis Ongeri
 - i. One month's salary in lieu of notice Kshs.19,906.50
 - ii. House allowance for 2013, 2014, 2015 and 2016 Kshs.92,880.00
 - iii. 12 months' compensation Kshs.238,878.00



Total Kshs.329,416.50

- a. Total amount Kshs.638,688.50
- b. Certificate of service
- c. Costs of this suit and interest.

Claimants' Case

3. The Claimants' case is pleaded as follows:
4. That in March 2015, the Respondent employed the 1st Claimant as a casual employee at Kshs.577/= per day or Kshs.17,310/= per month exclusive of house allowance. That the 2nd Claimant was employed in December 2012 at Kshs.412/= per day or Kshs.12,360/= per month exclusive of house allowance.
5. That the Claimants were working at Silpack Industries Limited on Likoni Road. It is the Claimants' case they signed a contract but were not given copies nor were they issued with itemised payslips but managed to secure a copy for purposes of a loan application.
6. That the 2nd Claimants' salary was increased following a general increment announced on Labour Day. The 1st Claimant's salary remained unchanged throughout his employment.
7. The Claimants aver that they were diligent employees of the Respondent.
8. It is alleged that on inquiry at the NSSF offices, the Claimants discovered that their contributions had not been regularised and the Respondent's Manager one Pamela informed the 2nd Claimant that payments would be regularized.
9. That around March 2016, the 1st Claimant enquired about his NHIF contributions and discovered that the same had been irregularly made.
10. The Claimants aver that in June 2016 they could not access their P9 forms for purposes of filing tax returns. It is their case that the Respondent rejected a form provided by the NSSF. That one Mr. Abel instructed the Claimants to leave promising that he would visit the NSSF offices but the Claimants stood their ground.
11. That Abel called the Respondent's Manager, one Benjamin Onsongo claiming that the Claimants were unruly and Mr. Onsongo summoned security who ordered

the Claimants to leave which they did.

12. It is averred that the Claimants reported to work on 20th June 2016 and worked the entire day but at 5.00 pm they were summoned for a meeting by one Mr. Allan, the Respondent's Manager at Silpack who informed them that they been relieved of their duties and were asked to leave. Attempts to report for duty on 21st June 2016 was unsuccessful as they were denied entry by security.
13. Finally, the Claimants allege that they were dismissed without any warning or termination letter or disciplinary hearing.

Respondent's Case

14. The Respondent denies having employed the Claimants in the terms of the memorandum of claim and aver that they were casual employees for specified periods and had not signed any long term contracts with the Respondent. That the amounts relied upon as daily wage was untrue and the alleged payslips



were fake and the signatures thereon forged. That it paid them no salaries and their wages depended on the nature and workload.

15. It is the Respondent's case that the Claimants were casual employees whose pay varied and not statutory deductions were made.
16. The Respondent avers that the Claimants were lawfully terminated and denies owing them the sum claimed.
17. Finally, the Respondent avers that the Claimants' employment was temporal and pray for dismissal of the suit with costs.

Evidence

18. Both claimants adopted the written statement and were cross examined. The statements replicate the contents of the memorandum of claim.
19. The 1st Claimant, Daniel Oseko Arasa confirmed that he was not a casual employee and his pay was Kshs.577/= per day paid through his bank amount. The witness denies that the payslips on record were forgeries.
20. The witness confirmed that the amount stated in the payslips was not reflected in the bank statement on record yet the witness claimed to have earned the money. That he would work overtime.
21. It was the 1st Claimant's testimony that his employment was terminated because of the inquiries he made about NSSF and the KRA P9 form and met one Abel. That police were called to the company's premises. That Abel was in the office. The 1st Claimant denied having been drunk on that day.
22. The 2nd Claimant, Mike Denis Ongeri stated that he was employed on 18th December 2012 and worked for four years. That his salary was Kshs.412/= per day paid through his bank account and had no payslip. It was his testimony that there was night duty and overtime that was slightly higher and was paid per month for the days worked and he worked every day.
23. That enquiries about the KRA P9 form precipitated his dismissal and Abel called the police since they were allegedly disorderly.

Respondent's Evidence

24. RW1, Mr. Abel Muranga adopted his statement and was cross examined. The witness testified that he joined the Respondent in January 2016 and was thus unaware when the Claimants were employed.
25. He confirmed that the wages of the Claimants were as alleged and remained unchanged throughout their employment. The witness confirmed that both Claimants completed a contractual document which he did not file away in Court.
26. It was further confirmed that the Claimants were paid per month for the days worked and often received overtime pay and worked half day on Saturdays. It was his testimony that the salary paid to the Claimants was consolidated. That the amount deposited in the account depended on the overtime hours worked and no slips were issued and a copy of the payroll was not filed.
27. The witness admitted that wages were paid by the accountant and he was not privy to it.
28. That on the alleged date of dismissal, the two Claimants reported to the office early, looked drunk and were disturbing the ladies in the office. That they were not terminated but ran away and did not return.
29. It was his testimony that they were paid for the days worked.



30. The witness confirmed that the Claimants were not invited for a disciplinary hearing since they left employment on the own accord. However, he admitted that the Respondent had their contacts on file.

Claimant's Submissions

31. The Claimant isolates several issues for determination:

- i. Whether the Claimants were permanent employees of the Respondent;
- ii. Whether the Claimants were dismissed from employment or absconded duty;
- iii. Whether the dismissal was lawful and fair;
- iv. Whether the Claimants are entitled to the reliefs sought.

32. As to whether the Claimant were casual or permanent employees, it is submitted that the Claimants monthly salaries were Kshs.17,310/= and Kshs12,360/= per month based on their daily wage of Kshs.577/= and Kshs.412/= respectively and the variation was as a consequence of overtime payment and shifts.

33. It is the Claimants' case that the bank statements and copies of payslips attached showed that they were permanent employees of the Respondent. Reliance is made on Section 9 and 37 of the Employment Act to urge that Claimants' employment had transitioned from casual to permanent. Reliance is made on the decision in Christopher Baraza Wasike v Pemco Agencies Limited [2018] eKLR in support of the submission.

34. It is submitted that since the 1st Claimant worked for one year, three months while the 2nd Claimant worked for over four years, they were permanent employees of the Respondent.

35. As to whether the Claimants were terminated or absconded duty, it is submitted that on 20th June 2016, the Respondent's supervisor Mr. Allan informed the Claimants that their employment had been terminated.

36. The Claimants submit that the evidence of RW1 was less than candid.

37. The decision in David Nyanjui Mburu v Sunmatt Limited [2017] eKLR is relied upon to demonstrate the duties of the employer when an employee abscond duty.

38. As regards termination, it is the Claimants' case that it was substantively and procedurally unfair in that the Respondent had no genuine reason(s) to terminate the Claimants and did not take them through any disciplinary proceedings before termination. That the Respondent led no evidence of the alleged disturbance or the ladies allegedly harassed by the Claimants.

39. Reliance is made on the provisions of Section 41 and 43 of the Employment Act as well as the decisions in David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR to reinforce the submission.

40. As to whether the Claimants are entitled to the reliefs sought, it is submitted that the Claimants are entitled to the reliefs by virtue of the provisions of Sections 36 of the Employment Act, 2007 for the one month in lieu of notice, Section 31 for house allowance and Section 49 for compensation.

Respondent's Submissions

41. The Respondent identifies two issues for determination:



- i. Whether dismissal of the claimants was unfair;
 - ii. Whether the claimants are entitled to the reliefs sought.
42. On the first issue, the Respondent states that the Claimants worked for less than three months as evidenced by their bank statements and were paid as casuals. That they had only proved the daily wage as opposed to basic salary.
43. It is submitted that RW1's evidence showed that Claimants were casual workers hired on need basis. That their service was discontinuous and did not fall within the requirements of Section 9(1) and (2) of the Employment Act.
44. It is the Respondent's submission that the payslips exhibited by the Claimants were forgeries and were not

issued by the Respondent.

45. It is submitted that the Claimants confronted the Respondent's female staff violently over NHIF deductions and disappeared when police were summoned. That the Claimants did not deny the incident. That their failure to report to work amounted to termination on their part.
46. The Court is urged to find that the Respondent is not guilty of unlawful or unfair termination of the Claimants' employment.
47. As regards the reliefs sought, it is submitted that the Claimants are not entitled to the one month's salary as it has not been proved but could invoke the minimum wage if satisfied that the employees had served of more than three months. That they are not entitled to house allowance by virtue of being on daily wage.
48. On compensation, it is submitted that since the Claimants were casual employees, they are not entitled to compensation. It is submitted that termination by the employer has not been proved. That they disappeared for fear of being arrested and therefore absconded duty.
49. Reliance is made on the decision in Kelvin Gitonga Kinyua v Kenya Methodist University [2021] eKLR to urge the Court to dismiss the Claimants' case with costs.

Determination

50. From the pleadings, evidence on record and submissions by the parties, the issues for determination are whether:
- a. The Claimants were casual employees or permanent;
 - b. The Claimants' employment was terminated or they absconded duty;
 - c. The Claimant is entitled to the reliefs sought.
51. On the first issue, there is no dispute that the Claimants were employed by the Respondent on diverse dates in 2015 and 2012 respectively and left employment on 20th June 2016.
52. While the Claimants allege that they were permanent employees, the Respondent's case is that they were employed as casual employees and the employer appears to have complied with the relevant Regulation of Wages (General) (Amendment) Orders in 2012 and 2015.



53. Section 2 of the *Employment Act*, 2007 provides that casual employee means “a person the terms of whose employment provide for his payment at the end of each day and who is not engaged for a longer period than 24 hours at a time.”
54. The *Employment Act* does not provide for permanent employment but makes provision for transition from casual to term employment. In this case, the Claimants’ wage was Kshs.577/= and Kshs.412/= per day respectively paid at the end of the month for the days worked including the overtime earned as confirmed by RW1.
55. It is not in dispute that both Claimants served for more than one year. Although the Respondent’s witness acknowledged that the Claimants signed a document when they were employed. He testified that it was not filed. The witness confirmed on cross examination that he did not know when the Claimants were employed. More significantly, the Respondent did not avail attendance registers for the Claimants to show that they were casual employees. It was its obligation to do so to disprove the Claimants’ allegation as to the nature of their employment, having joined the Respondent in 2016. He admitted failing

to provide payslips or provide the payroll.

56. Section 37(2) of the *Employment Act* provides that:
1. Notwithstanding any provisions of this Act, where a casual employee—
 - a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - b. ...,
the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
 2. ...
 3. An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
57. In *Christopher Baraza Wasike v Pemco Agencies Limited* (supra) the Court expressed itself as follows:
- “In the circumstances, though the Respondent assumed the Claimant was a casual worker he worked for over two years and by virtue of Section 37 above he became a permanent worker. The assertion by the Respondent that the Claimant was a casual employee is thus refuted by the above provisions of the law and thus I find that the Claimant was an employee on permanent terms of employment. Being an employee on permanent terms, the Claimant could not be dismissed or terminated for whatever reasons without following due process.”
58. The Court is in agreement with these sentiments which in the Court’s view apply on all fours to the Claimants’ case.



59. Applying these provisions and proposition of law to the instant case, it is clear that the Claimants worked for about one year and three months and three years respectively. For the duration they served the Respondent, they worked in different shifts and earned overtime payable at the end of the month as bank statements on record attest. However, the Court finds the payslips produced by the Claimants unreliable. The Respondent on the other hand led no evidence to demonstrate that their employment was discontinuous at any point or worked for less than duration prescribed by Section 37 of the Act or that their contract was renewed on a daily basis.
60. In the circumstances of this case, the Court is satisfied and finds that the Claimants transitioned from casual to permanent employment terms by virtue of the provisions of Section 37 of the Employment Act, 2007.
61. As to whether the Claimants' employment was terminated or they absconded duty, the applicable laws are the provisions of the Employment Act and relevant judicial authority. The provisions of Section 35, 40, 41, 43, 44, 45 and 47(5) of the Employment Act set forth the basic infrastructure on lawful termination or dismissal from employment. Section 45(1) is unequivocal that "No employer shall terminate the employment of an employee unfairly."
62. Undoubtedly, fairness is the operative paradigm in termination of employment contracts. Sections 45(2)(a), (b) and (b), 43(1) and 47(5) of the Act places an onerous burden on the employer, who must prove that it had a valid and fair reason to terminate the employment and conducted it in consonance with a fair procedure. It is the duty of the employer to justify the grounds for the termination.
63. The employee on the other hand is required to prove not only that there was a termination or dismissal but also that the termination or dismissal was unfair. See Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR.
64. In the instant case the Claimants posit that their employment was unfairly terminated on 20th June 2016 after 5.00 pm when one Mr. Allan informed them that there would be no work for them henceforth and were told to leave, and they left. It is their case that they were not given termination letters. It is their testimony that attempts to access the premises on 21st June 2016 failed.
65. In their view, their employment was terminated because
of the inquiries they had made about NSSF and NHIF contributions and the demand for the KRA P9 forms from the Respondent.
66. In their written statements, both Claimants state that they were dismissed by a Mr. Allan on the afternoon of 20th June 2016. However, on cross examination, both witnesses confirmed that on the material day, they found Mr. Abel in the office and he is the one who accused them of being unruly and called the police. Neither of the Claimant testified on what transpired thereafter and how they left the premises.
67. RW1 testified that the Claimants ran away and he could not
get them for purposes of dismissal.
68. Could it have been that they ran away when police officers were called as suggested by RW1, an act both admitted in evidence?
69. The Respondent's submission that the Claimants confronted female staff members violently is unsupported by evidence as are the allegations that they were drunk.



70. In the South African decision in *Seabolo v Belgravia Hotel* [1997] 6BLLR 829 (CCMA), the Court distinguished desertion from absence without leave in the following terms:

“... desertion is distinguished 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 own post subsequently formulates the intention not to return.”

71. If the Claimants’ employment was terminated as alleged who did so when and how was it effected? The written statements make no reference to Mr. Abel and the calling of the police on the material day. If the Claimants’ employment was terminated by Mr. Allan on 20th June 2016, why did they report back to the workplace on 21st

June 2016, when they allege to have been denied entry?

72. RW1’s testimony is consistent that the Claimants were not terminated but ran away and absconded duty after they were accused of harassing the Respondent’s staff and police were called.

73. If the Claimants ran away and absconded duty, which is plausible, how did the Respondent address the situation?

74. Courts have been consistent on the issue of abscondment of duty. Wherever an employer asserts that an employee absconded duty, it is incumbent upon the employer to demonstrate what reasonable steps it took to ascertain the whereabouts of the employee including a notice to show cause why the employee should not be dismissed for having absconded duty. The employee must be made aware that the question of his/her termination from employment is being considered on account of his absence. See *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR.

75. Finally, a termination or dismissal letter is necessary for purposes of closure. See *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR, *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR. A notification to the Labour Office that an employee has absconded duty reinforces the employer’s case.

76. In the instance case, RW1 testified that when the Claimants ran away, the Respondent did not know where they went until they filed the instant suit. It was the Respondent’s case that because it was unaware of their whereabouts, it could not invite them for a disciplinary hearing.

77. Strangely however, the witness admitted on cross examination that the Respondent had the Claimants’ contact on file but he could not get them.

78. RW1 adduced no evidence of any attempt by the Respondent to reach out to the Claimants through their mobile telephone numbers or in writing. In a nutshell no steps were taken to ascertain why the Claimants were not reporting to the workplace.

79. Even assuming that the Claimants absconded duty, they were entitled to the fair disciplinary process prescribed by Section 41 of the *Employment Act* and no evidence to that effect was provided. See *Judith Atieno Owuor v Sameer Agricultural Livestock Limited* [2020] eKLR.

80. In the absence of evidence of a fair termination of employment or evidence of abscondment of duty, the Court is satisfied and finds that the Claimants have on a balance of probabilities established that termination of their employment by the Respondent was substantively and procedurally unfair for noncompliance with the provisions of the *Employment Act*.

Reliefs



- a. One month's salary in lieu of notice
81. Having found that the Claimants were not casual employees, the provisions of Section 35(1)(c) of the Employment Act applied to their employment contract and they ought to have been given the requisite notice of termination and as it was not given, they are entitled to and are awarded the same.
- b. House allowance
82. This is a statutory right guaranteed by the provisions of Section 31(1) of the Employment Act. See Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu [2019] eKLR. This is the right to housing in employment. The employer is bound to provide housing or an allowance or ensure that the salary paid has a housing component.
83. The Court of Appeal has recognised 15% of basic pay as reasonable house allowance. In this case the Claimants pray for 15% of the basic pay. However, the Court has noted that the figure used as salary is arrived at by multiplying the daily wage by 30 days and is taken as the basic pay and 15% of as house allowance. This, in the Court's view is incorrect. The aggregate daily wage per month is not equivalent to basic salary.
84. Unlike the minimum monthly wage prescribed by the Regulation of Wages Orders, the daily minimum wage is inclusive of house allowance and for purposes of equity, an employer may opt to pay the daily wage as a monthly salary but pay a house allowance in the latter case. For instance, under Legal Notice No. 71 of 2012 effective on 1st May 2012, the daily wage was Kshs.412.80 inclusive of house allowance, but the monthly salary was Kshs.8,579.50 for a general labourer in Nairobi, Mombasa or Kisumu. Under Legal Notice 117 of 2015 effective on 1st May 2015 the minimum daily wage for a general labourer was Kshs.527.10 inclusive of house allowance, while the monthly salary was Kshs.10,954.70, exclusive of

house allowance.

85. It would appear to follow that the figures used by the Claimants to compute house allowance are inclusive of house allowance. In the Court's view, the 15% house allowance is only justifiable where the minimum monthly wage is used as the basic salary, not the daily wage multiplied by the number of days in a month. The justification is not difficult to find. Whereas a daily wage earner is not assured of work the following day as a matter of course, a monthly paid worker enjoys some form of job security. The extra earning or pay caters for inter alia the uncertainty involved. Thus, using the daily wage to compute the monthly salary distorts the principle of minimum wage under the Regulation of Wage Order in question and is inequitable to the employer. Using the aggregate daily wage to compute house allowance is tantamount to double compensation or pay for housing since the daily wage is inclusive of house allowance and patently unfair to the employer.
86. In the circumstances it is the finding of the Court that the 1st Claimant is not entitled to house allowance. For the 2nd Claimant, the Court is of the view that in the interest of equity, house allowance is payable by the Respondent at 15% of the minimum monthly wage at the time.
87. For instance, in 2013 the minimum daily wage was Kshs.470.50 and the monthly was Kshs.9,780.95. the 15% house allowance is on the monthly wage as opposed to the aggregate of daily wage as the monthly wage as proposed by the Claimants.
88. Noteworthy, the 2nd Claimant was underpaid from 1st May 2013 to June 2016 but did not allege so or make any specific prayer which must be pleaded and proved.



89. The 2nd Claimant is awarded 15% house allowance from 1st May 2013 to June 2016.
- c. 12 months' compensation
90. On account of the findings above, the Claimants are entitled to the relief provided by Section 49(1)(c) of the *Employment Act* subject to compliance with the provisions of Section 49(4) of the Act in the determination of the quantum of compensation:
- i. The Claimants were in the employment of the Respondent for one year, three months and three years and six months respectively, which is relatively a short duration and wished to continue.
- ii. The Claimants contributed to the termination of employment.
- iii. The Claimants did not appeal the decision.
- iv. That the Claimants had no record of misconduct or conduct unbecoming.
91. In the circumstances of this case, the equivalent of one month's salary for the 1st Claimant and two months' salary for the 2nd Claimant is fair.
92. In the final analysis, judgment is entered for the Claimants against the Respondent in the following terms:
- a. 1st Claimant – Daniel Oseko Arasa
- i. One month's salary in lieu of notice Kshs.17,310
- ii. Equivalent of one month's salary Kshs.17,310
- Total Kshs.34,310
- b. 2nd Claimant – Mike Denis Ongeru
- i. One month's salary in lieu of notice Kshs.15,813.00
- ii. 15% house allowance on basic monthly salary payable under the Regulation of *Wages (General) (Amendment) Order* 2013 of Kshs.9,780.95 effective 1st May 2013 to 30th April 2015 (24) months Kshs.35,211.42
- iii. Equivalent of 2 months' salary Kshs.31,626.00
- Total Kshs.66,837.42
- c. Costs of this suit.
- d. Interest at Court rates from date of judgment till payment in full.
93. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF MAY 2022

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

