



**Ndupha v Mandeep Singh Construction (K) Limited (Cause
2624 of 2016) [2022] KEELRC 1419 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1419 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2624 OF 2016
MA ONYANGO, J
MAY 13, 2022**

BETWEEN

ROBERT CHAKA NDUPHA CLAIMANT

AND

MANDEEP SINGH CONSTRUCTION (K) LIMITED RESPONDENT

JUDGMENT

1. Vide his Statement of claim dated and filed in court on 2December 2, 2016, the claimant avers that his employment was unfairly and unlawfully terminated by the respondent - a registered limited liability company.
2. His case is that he was employed by the respondent on or about May 4, 2015 in the capacity of a Mechanic and was earning a monthly salary of Kshs.25,000/-, which amount was exclusive of house allowance.
3. He averred that his employment contract with the Respondent was oral and was never reduced into writing as required under section 9 of the *Employment Act*, 2007.
4. The claimant maintained that he at all times during the subsistence of his employment relationship with the respondent performed his duties diligently and to the respondent's satisfaction until on or about December 21, 2015 when the respondent without any just cause or without prior notice terminated his employment contrary to the mandatory provisions of section 41 of the *Employment Act*, 2007.
5. Aggrieved by the decision to unlawfully and unfairly terminate his employment, the claimant filed the instant claim seeking the following reliefs:
 - (a) A declaration that the claimant's termination from his employment was wrongful.



- (b) The claimant be paid his terminal benefits totalling to Kshs.667,780/- comprising of the following: -
- (i) Salary for the month of June, July and December 2015 at Kshs25,000 Kshs.75,000
 - (ii) One month's salary in lieu of notice Kshs.28,750
 - (iii) Public holidays 4 public holidays
(1,106 x 4 x 2) Kshs.8,848
 - (iv) House allowance 15% of basic
(3,750 x 8) Kshs.30,000
 - (v) Overtime 138 x 3 x 74 x 7½ months
x 1.5 Kshs.130,412
 - (vi) Off duty 1,106 x 4 x 705 Kshs.33,180
 - (vii) Prorata leave 2 days 2 x 7.5 = 15 days
1,106 x 15 Kshs.16,590
 - (viii) 12 months compensation for wrongful dismissal
28,750 x 12 Kshs.345,000
 - (ix) Certificate of Service
Total Kshs.667,780
- (c) The respondent be ordered to compensate the claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary
- (d) The honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (e) The respondent to pay the costs of this claim
- (f) Interest on the above at court rates
- (g) The respondent be ordered to issue the claimant with a Certificate of Service as required by the provisions of section 51 of the *Employment Act*, 2007.
6. The respondent in its statement of defence dated January 16, 2017 and filed in court on January 17, 2017 denied engaging the claimant for the period alleged by the claimant in his statement of claim.
7. The respondent avers that it employed the claimant between the months of September 2015 and December 2015 on a probationary basis before the claimant absconded duty on December 16, 2015.
8. The respondent avers that during the claimant's employment he was paid Kshs.14,538/- in cash and Kshs.9,615/- though his Mobile number for the days worked in the 2 months as evidenced by the master roll and petty cash vouchers.
9. The respondent's avers that the claim filed is without merit and ought to be dismissed with costs to the respondent.



Evidence

10. The matter proceeded for hearing on November 16, 2021 when the claimant testified on his behalf and Mandeep Singh, testified on behalf of the respondent Company.

Claimant's Case

11. The claimant adopted his witness affidavit sworn on August 14, 2020 as his evidence in chief. In his witness affidavit, the claimant reiterates the averment made in his statement of claim.
12. The claimant testified that he was paid his salary monthly as was evidenced by the payslips annexed to his statement of claim. He further testified that he left the respondent's employment on December 25, 2015 after he was not allowed into the premises without just reason or notice.
13. The claimant considered the termination unfair as he was neither accorded an opportunity to defend himself of any wrong-doing nor was he issued with a show cause and/or termination letter prior to his termination.
14. He therefore urged this court to find merit in his claim and allow it in terms of the reliefs sought therein.
15. On cross examination, the Claimant confirmed that he was employed by Respondent effective 4th May, 2015 and that the agreed monthly salary was Kshs.25,000/-. He further testified that there was overtime payments that were done depending on the overtime worked.
16. The Claimant denied the Respondent's allegation that he absconded duty. He further stated that he only had two payslips because they were the only ones issued to him by the Respondent. He further confirmed that as indicated in the master roll, he worked for 14 days in September and 20 days in November 2015 and was duly paid for the days worked. He however denied payments via M-Pesa insisting that his salary was paid in cash. He denied signing the discharge voucher annexed to the Respondent's list and bundle of documents.

Respondent's Case

17. Mandeep Singh - RW1, in his evidence reiterated the averments made in the statement of defence. he testified that the claimant was employed in mid-September and was earning an agreed consolidated salary of Kshs.25,000/-. It was his testimony that the claimant was on this basis not entitled to house allowance.
18. On overtime payment, RW1 testified that all overtime payment was made together with the subsequent month's salary.
19. RW1 further testified that as evidenced by the Master Roll produced in this matter, the claimant was not under its employment in the month of May, 2015 as alleged and only worked in the months of October and November, 2015.
20. RW1 further testified that the claimant worked inconsistently in the month of December, 2015 and that his salary for days worked in December was paid via M-Pesa as he was not available to receive his payments.
21. On cross examination RW1 testified that the only master roll produced was for the month of September 2015 and that he did not avail to the court for inspection the Master Roll for the months of June, July and August 2015. He stated that the respondent did not furnish any records for inspection by the court for the months of May to August, 2015.



22. RW1 urged this court to dismiss the claim in its entirety with costs to the respondent.

Submissions by the Parties

23. It was the claimant's submission that the termination of his employment was unlawful, unfair and fair procedure was not followed as provided under sections 35, 36, 41 and 43 of the Employment Act, 2007. The claimant argued that he is entitled to the reliefs sought in his claim.

Respondent's Submissions

24. The Respondent submitted that the claimant was under its employment from mid-September 2015 to December and was paid all his dues during this period he worked. It further submitted that the claimant's contention that he was employed as from May 2015 is not supported by any evidence and is an attempt to unjustly enrich himself.

25. The respondent further submitted that it did not at anytime terminate the claimant's employment as alleged but rather he absconded duty and is therefore not entitled to compensation as sought in his statement of claim.

26. On reliefs sought the respondent submitted that the claimant having failed to prove his case is not entitled to the grant of the reliefs sought in his statement of claim.

27. The respondent maintained that the claimant is only entitled to issuance of his certificate of service for the period worked.

28. In conclusion the respondent urged this court to find that the instant claim is devoid of merit and to dismiss it with costs to the respondent.

Analysis and Determination

29. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto I am of the view that the following are the issues for determination:

- i) Whether the claimant was under the respondent's employment as from May, 2015;
- ii) Whether the termination of the claimant's employment was valid both procedurally and substantively;
- iii) Whether the claimant is entitled to the reliefs sought

Whether the Claimant was under the Respondent's employment as from May, 2015

30. The claimant maintained he was employed by the respondent on May 4, 2015 in the position of a mechanic earning an agreed monthly salary of Kshs.25,000/-. That he was never issued with any letter of appointment or employment contract by the respondent to prove his employment.

31. The claimant went on to explain how he performed his duties at the respondent including times he reported to work and how he received his salary.

32. The respondent on the other hand denied employing the claimant as from May 2015 and insisted that he was employed in the month of September 2015 to December 2015 and that he, (the claimant) was on internship/probation commencing the last week of September 2015 for a period of 3 months.

33. The respondent further maintained that as a result of the type of engagement the claimant had with it, the claimant was not integrated into its payroll system and his salary was paid via cash and M-Pesa.



34. To prove its case the respondent produced as evidence the master roll which it maintained was for the month of September 2015 and did not have the claimant's name.
35. I have examined Exhibit 2 attached to the respondent's list and bundle of documents dated January 16, 2017 and filed in court on January 17, 2017 and note that the same does not indicate which month it is for.
36. In the hearing RW1 stated that the master roll was only for the month of September. Conveniently, the respondent failed to furnish this court with copies of the master roll for the months of May, June, July and August 2015.
37. Under section 10(6) and 10(7) where an employee fails to submit prescribed records for inspection by the court the burden of controverting the averments of the employee lie with the respondent.
38. I therefore find that the respondent has not proved that the claimant was not its employee as from May 2015 to December 2015.

Whether the termination of the Claimant's employment was valid both procedurally and substantively

The Law

39. The Law relating to fair termination is contained in Sections 41, 43 and 45 (2) of the [Employment Act](#).
40. The Claimant submitted that the Respondent unlawfully and unfairly terminated his employment without any notice or according him a chance to defend himself.
41. He maintained that the termination was oral as no letter of termination was issued to him contrary to the mandatory provisions of sections 41, 43 and 45 of the [Employment Act](#), 2007.
42. It was the respondent's position however, that it did not terminate the claimant's employment but rather the claimant absconded lawful duties on or about December 14, 2015. It accused him further of attending to duties irregularly in that month of December, 2015 before he left employment all together.
43. Absconding duty is in fact a ground for summary dismissal under section 44(4)(1) of the [Employment Act](#), 2007. However, for it to stand the employer must prove that as an employer it tried to get in touch with the claimant to find out his whereabouts.
44. This court has on several occasions pronounced itself on the procedure to be followed by an employer in the event an employee absconds lawful duties.
45. The respondent in this case failed to show this court any efforts made to contact the claimant for purposes of enquiring his whereabouts. I refer to the case of [Simon Mbiti Mbane v Inter Security Services Limited](#) (2018) eKLR in which the court held that where there is an allegation of absconding duty, the employer must demonstrate the efforts made to contact such an employee without success.
46. In absence of any proof the claim for absconding duties falls flat. The court in turn makes a finding that the claimant's oral termination was in fact unlawful and unfair within the meaning of section 45 of the [Employment Act](#), 2007.



Whether the Claimant is entitled to the reliefs sought

47. Having found that the claimant's termination was indeed unlawful and unfair, the claimant is entitled to the following reliefs:-
- (a) A declaration that the claimant's termination from his employment was wrongful
48. Having found that the claimant was unlawfully and unfairly terminated by the respondent this court makes a declaration that the claimant's oral termination was indeed wrongful as it failed to comply with the mandatory provisions of section 41 of the Employment Act, 2007.
- (b) Salary for the month of June, July and December 2015
49. The claimant claimed payment of unpaid salaries for the months of June, July and December 2015.
50. This court has considered the arguments for and against this award together with the evidence adduced and note that the respondent's exhibit 1 at page 8 and 9 are petty cash vouchers for salaries paid for the days worked in September and December, 2015 for Kshs 14,538 and Kshs 9,615 respectively. The claimant on the other hand denied signing the two vouchers in receipt of the payments.
51. The claimant insisted that his salary was never paid via mpesa as contended by the respondent. given that the respondent claims the December salary was paid via Mpesa it ought to have availed to this court proof of payment of such monies.
52. In absence of such proof, I find that the claimant is entitled to compensation under this head.
- (c) The claimant be paid his terminal benefits totalling to Kshs.667,780
53. Under this head the claimant is entitled to the following: -
- (i) Salary for June, July and December 2015 Kshs.75,000/-
- (ii) One month's salary in lieu of notice Kshs.25,000/-
54. The Claimant is entitled to compensation under this head by dint of the provisions of section 36 of the Employment Act, 2007.
- (iii) Public Holidays 4 days.....Kshs 8,848
55. This claim fails for want of proof.
- 9iv) House allowanceKshs 30,000
56. The claimant maintained that he was earning a basic salary of Kshs.25,000/- and that the amount was exclusive of house allowance. He further stated that the respondent did not provide him with housing and is therefore to payment of house allowance.
57. The respondent on its part maintained that the claimant's salary was agreed to be a consolidated amount of Kshs.25,000/- and is therefore not entitled to compensation under this head.
58. The claimant is entitled to compensation under this head by dint of section 31 of the Employment Act. The same is tabulated as follows:
- $1/5 \times \text{Kshs } 25,000 \times 8 \text{ months} = \text{Kshs } 30,000/-$
- (v) Overtime payment and payment of prorated leave
59. These claims fail for want of proof.



- (vi) 12 months compensation for wrongful dismissal Kshs.345,000/-
60. Taking into account the claimant's length of service and the Respondent's conduct in the termination transaction, I find that an award of 2 months' salary as compensation in the sum of Kshs 50,000 is adequate compensation under this head.

Issuance of a certificate of service

61. The claimant is entitled to certificate of service by dint of section 51 of the Employment Act, 2007.
62. The claimant is also awarded costs and interest from the date of Judgment until payment in full.
63. In summary the judgment and is hereby entered in favour of the claimant against the respondent in the following terms:
- (a) 2 months' compensation for unfair termination Kshs 50,000
 - (b) One month's salary in lieu of notice Kshs 25,000
 - (c) Unpaid salary for June, July and December Kshs.75,000
- Total award Kshs 150,000
- (d) The Respondent shall pay claimant's costs for the suit.
 - (e) Interest shall accrue from date of judgment at Court rates of 12% pa.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

