



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wafula v Gurdit Singh Shop (Cause 47 of 2018)  
[2022] KEELRC 15 (KLR) (9 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 15 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 47 OF 2018  
NJ ABUODHA, J  
MAY 9, 2022**

**BETWEEN**

**KENNEDY MAKHINO WAFULA ..... CLAIMANT**

**AND**

**VANDEEP SINGH T/A GURDIT SINGH SHOP ..... DEFENDANT**

**JUDGMENT**

1. The claimant alleged that he was orally employed by the respondent on 4<sup>th</sup> April, 2013 as a messenger earning Ksh.250 per day. At the time of termination, he was earning Ksh.420/= per day which translated to Ksh.8,820/= per month.
2. According to him he served the respondent diligently until 24<sup>th</sup> October, 2017 when the respondent unlawfully and unfairly terminated his service.
3. According to the claimant, the books allegedly stolen were neither in his custody nor was it his role to keep them safe. Further that he was employed as messenger and at no time did he handle books. He delivered already packaged books to designated customers and therefore could not have stolen or handled books directly.
4. The claimant alleged that as a result of the allegations he was told never to step at his place of work again and further that the respondent upon terminating his service never paid his terminal dues.
5. The respondent on its part pleaded that the claimant was hired sometime in September, 2017 as a casual labourer assisting in loading and offloading books and delivering books to various clients. He was paid Ksh.420 per day.
6. On 24<sup>th</sup> October, 2017 while at work the claimant was caught stealing books. When the respondent tried to take him to the police station he absconded duty and never returned. The issue was reported to the police under OB No. 54/24/10/2017 undergoing investigations.



7. At the hearing the claimant stated that he was employed as a messenger in April, 2013 at a salary of Ksh.250/= per days. This was later increase to Ksh.420/= per day. He left in October, 2017 when he was accused of stealing books. He denied stealing books. The books allegedly stolen were to be delivered to Mediheal Nakuru.
8. It was his evidence that before dismissal he was not issued with any show cause letter and was not paid his salary at the time of termination. He further stated that during the period he worked he never went on leave. He denied absconding work and further that he had never been arrested and charged with theft. He further stated that he was never registered for NSSF and NHIF and that he was never taken through and disciplinary hearing before dismissal.
9. In cross-examination he stated that he had nothing to show he started working in 2013. He denied disappearing from work on suspicion of being about to be arrested and that he worked in the entire month of October.
10. The respondent's witness Mr. Satwinder Kaur stated that he worked for the respondent as a manger. He recorded his witness statement on 9<sup>th</sup> April, 2018 which he relied on as his evidence in chief.
11. According to him, the claimant absconded work after he was found stealing and that the matter was reported to the police. The claimant was asked to go upstairs and bring two boxes 2 so that books could be packed inside. He came back holding one box with one hand and the box appeared heavy when he inspected it, he found it was full of books. When asked where the books were from the claimant said he did not know. He reported the issue to his boss who reported the issue to the police. When the claimant realized the issue had been reported to the police he left his place of work and never came back after the incident.
12. In cross-examination he stated that he had worked for the respondent for fifteen years and that the shop had been operating for twenty five years. In 2013 the shop was operating and that he had no employee records in Court but they kept them. According to him the claimant was hired in 2017 and had worked for only a month. The claimant used to do numbering and packing of books and also used to do deliveries.
13. Regarding employee records he stated that he never used to deal with the same but the respondent kept employee details including copies of their identity cards. They however did not have the claimant's phone contacts. He further stated they never looked for the claimant and further that they never invited him for any disciplinary hearing. He was further not given any termination letter because the claimant ran away and never came back. The claimant never even came back to ask for his salary for the month worked.
14. On the issue of leave, he said this never arose because the claimant had only worked for a month.
15. Under section 2 *Employment Act*, a contract of service means an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time.
16. Under Section 9, the general provisions of contract of service apply to oral and written contracts. Further under subsection (2), an employer who is a party to a contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment.
17. The claimant herein alleged he was employed in 2013 while the respondent claimed he was employed in 2017. The respondents witness Mr. Shah informed the Court that the respondent had been in existence for over twenty five years and that in 2013 the respondent was operating.



18. It is the responsibility of an employer to keep employee records showing when such employee was hired, his terms of service and related particulars. Where an employer fails to do so, it gets to the disadvantage of such employer to disprove allegations by an employee concerning their terms of service. The respondent in this particular case never produced any evidence to rebut the allegations by the claimant that he was hired by them in 2013 and not 2017. The Court will therefore believe the claimant that he was hired in 2013.
19. Regarding the termination of the claimant's service, the respondent alleged that the claimants absconded duty after being caught attempting to steal books from the respondent and had by the time of trial never gone back to work. Further the respondent stated that they never looked for the claimant and that they did not issue him with a show cause letter or subject him to disciplinary hearing. Mr. Shah for the respondent further stated that they did not have the claimants contacts.
20. Section 74 of the Employment Act confers responsibility on the employer to keep employee records. Failure by the respondent to keep up to date records of the claimant, worked to its disadvantage.
21. An employee can only be terminated from employment on account of absconding duties after the employer has reasonably shown that it made reasonable efforts to contract such employee without success. In this particular case the respondent stated that they never bothered to look for the claimant after he allegedly absconded duty upon being caught attempting to steal books.
22. Failure by the respondent to show that efforts were made to contact the claimant in order to subject him to disciplinary hearing lends credence to the allegation by the claimant that he was chased away and told never to come back to the respondent's premises. Such a mode of separation from employment is not recognized under the Employment Act and is at best an unfair termination of service and the Court so finds and holds.
23. Regarding claims for compensation the claimant alleged he was underpaid yet did not present the relevant wage order to enable the Court compare with what he was paid by the respondent to see if indeed there was any underpayment. This claim will therefore be disallowed.
24. The claimant stated that he used to be paid Ksh.420 per day which translated to Ksh.8,820 per month. The Court will therefore award the claimant as follows:
  - a. One month's salary in lieu of notice Ksh 8,820
  - b. Leave dues for 3 years (as prayed) Ksh 26,460
  - c. Service pay for 3 years Ksh 13,230
  - d. Six months' salary for unfair termination of service Ksh 52,920Total Ksh 101,430
  - e. Costs of the suit.
25. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 9 DAY OF MAY, 2022**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

