



**Mwangi v Nirma Kenya Limited (Cause 1336 of 2016)
[2022] KEELRC 1695 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1336 OF 2016
MA ONYANGO, J
MAY 12, 2022**

BETWEEN

JAMES MWANGI CLAIMANT

AND

NIRMA KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant is a male adult resident in Nairobi. He has filed this claim against the Respondent, a limited liability company registered in Kenya. The issues in dispute as cited in the Memorandum of Claim dated 23rd June 2016 are unlawful/unfair termination of the Claimant's employment, non-payment of Claimant's salary for the month of June 2016, one month's salary in lieu of notice and letter of service.
2. The Claimant contends that he was employed by the Respondent as a general worker in the year 2011 on a verbal contract. He worked until June 13, 2016 when his employment was terminated without any justification.
3. The Claimant contends that on June 13, 2016 he reported to work as usual at about 9.00 am. He was summoned to the office of Mr. Suresh, one of the Respondent's directors who instructed him to report for work at Alanga (K) Limited which was situated at a different premise but within Industrial Area, Nairobi. However, when he reported at Alanga (K) Limited, the shop owners were surprised when he informed them that he had been sent there by Mr. Suresh and was asked to report back to his workplace.
4. The Claimant contends that upon return, Mr. Suresh informed him that his services were no longer required. He was never paid his June 2016 salary.



5. The Claimant contends that his last salary was Kshs.19,440/-. He has appended to his bundle of documents from pages 11 to 14 copies of his payslips for eight months between October 2015 to May 2016. The last payslip reflects that his basic salary was Kshs.16,905.00 with house allowance of Kshs.2,535/-. For the month of May he was paid overtime of Kshs.1,254.67.
6. The Claimant prays for Judgment against the Respondent as follows –
 - a. A declaration that the termination of the Claimant from employment by the Respondent was unfair.
 - b. June 2016 salary Kshs.19,440
One month's salary in lieu of notice Kshs.19,440
 - c. Leave days earned but not paid (30) Kshs.140,000
 - d. 12 months' pay for unfair termination
(12 months x 19,440) Kshs.233,280
 - e. Payment of accrued leave days
 - f. Letter of service
 - g. Costs and interest of this suit.
7. The Respondent filed a Memorandum of Reply dated 26th July 2016 in which it avers that the Claimant was transferred to work in the Respondent's stores and not at Alanga (K) Limited as alleged by the Claimant.
8. That upon transfer the Claimant went to the store and after a while went back and informed the Respondent that he could not work at such place. That the Claimant then left, vowing to teach the Respondent a lesson. It is the Respondent's averment that the Claimant thus absconded duty. That since the Claimant constructively resigned, he is not entitled to any of the prayers sought.
9. Together with the Memorandum of Reply, the Respondent filed a witness statement of Satish Devhand Jakharia, a Manager/Director of the Respondent who reiterates the averments in the Respondent's Memorandum of Reply.
10. The case was heard on February 9, 2022. The Claimant testified on his behalf. He adopted his witness statement which is a reiteration of the averments in the Memorandum of Claim. He also adopted his list and bundle of documents being his payslip which I have already referred to above, a letter of demand and a response to the letter of demand by the Respondent.
11. Upon cross examination by Counsel for the Respondent, the Claimant stated that he was employed as general worker at the Respondent's premises at Ukwala Road and that Mr. Suresh who sent him to Alanga (K) Limited was a brother to the boss. That at Alanga, he was told there was no work and the boss was not available.
12. The Respondent closed its case without calling any witness.
13. In the written submissions, the Claimant submits that he had proved that he was an employee of the Respondent, that his salary was Kshs.19,440 per month and that the termination of his employment was unfair as he was never informed of the reasons for termination of his employment or given an opportunity to defend himself.



14. That he was never issued with a termination notice which was contrary to the employment law. That the Respondent did not respond, to the letter of demand and finally that the evidence or record and pleadings filed by the Respondent do not reflect that the Claimant was served with any warning letters before his employment was terminated.

15. The Claimant relies on the decision in *George Onyango Akuti v G4S Security Services Kenya Ltd* [2013] eKLR where the Court held –

“The statutory burden upon a person complaining of unfair termination of employment or wrongful dismissal is found in section 47(5) of the *Employment Act*. The section provide that:

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred.

An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer.”

16. The Claimant concluded that he had proved that his employment was unfairly terminated and he was therefore entitled to the prayers sought in his Memorandum of Claim.

17. In the Respondent’s written submissions, it submits that the Claimant absconded duty, relying on the decision in *Philemon Kiprotich Kirui v Lessos Veterinary Suppliers Ltd (CICADA Hotel)* [2015] eKLR where the Court stated –

“An employer who terminates the services of an employee on grounds of abscondment or desertion has to demonstrate and/or prove that the employee had no intention of resuming work.”

18. That this was echoed by the Court in *Sacwu v Dyasi* [2007] 7D LLR 731 (LAL) where the Court held that:

“Desertion on the other hand, requires an employee to infer an intention on the part of the employees, as a result of such employee’s conduct, that the employee has no intention to return to work.”

19. The Respondent relied further on the case of *Stanley Omwoyo Onchwari v Board of Management Nakuru YMCA Secondary School* [2015] eKLR, where the need for employers to exercise caution when invoking desertion as a ground to summarily dismiss an employee was emphasized. It was held thus: -

“For the benefit of litigants, the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work.



Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.”

20. The Respondent also cited the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, where the Court held that -

“Desertion of Duty or Unlawful Termination

In this case when replying to the Claimant's claim, the Respondent stated that the Claimant himself deserted duty after being involved in several instances of gross misconduct. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration as was reiterated in the case of *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR.”

21. The Respondent submits that in the instant suit it can be inferred that the Claimant had intention not to resume work even after being asked to do so by the Labour Officer.
22. Further that the Claimant did not furnish the Court with a valid reason to justify his continued absence from work thus the inference of his desertion of duty by the Respondent was reasonable.
23. On the Claimant's prayers, the Respondent submits that the Claimant intends to unjustly enrich himself to the detriment of the Respondent. It relies on the decision in *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR where the Court cited with approval the decision of *D. K. Njagi Marete v Teachers Service Commission* [2013] eKLR. In the said case, the Court held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way.
24. The Respondent prays that the claim be dismissed with costs.

Analysis and Determination

25. It is not contested that the Claimant was an employee of the Respondent from 2011 to June 13, 2016. What is contested is whether the Claimant was dismissed or absconded duty.
26. The Respondent did not call any witness to adduce evidence in its defence. All it filed in its defence was its Memorandum of Reply and unsworn witness statement of Satish Devchan Rajharia.
27. Odunga J. in the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, comprehensively considered whether pleadings can guide the Court or be substituted for evidence when he observed as follows –

That averments in pleadings are not evidence was appreciated in *Francis Otile vs. Uganda Motors Kampala HCCS No. 210 of 1989* where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & another v Haidara* [1972] EA 166 where that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of*



1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In *CMC Aviation Ltd v Cruisair Ltd*. (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No. 834 of 2002, Lesiit, J citing the case of *Autar Singh Bahra and Another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

Again, in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani)* HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.”

28. The same position befalls the Respondent herein. It did not call any witness to give evidence on its behalf. The Claimant's evidence thus remains uncontroverted while the averments in the pleadings and witness statement remain just that, mere averments.
29. The Claimant's evidence having been uncontroverted, the Court makes a finding that the Respondent dismissed the Claimant from service without a letter of termination, without giving reason for the termination and without giving the Claimant an opportunity to defend himself. The termination was therefore unfair in terms of Sections 41, 43 and 45 of the *Employment Act*, and I declare accordingly.

Remedies

30. Having found the termination of the Claimant's employment unfair, he is entitled to salary to the last day worked, pay in lieu of notice and compensation. I award him the same as follows –
 - i. Pay for 13 days worked in June 2016 Kshs.9,720.00
 - ii. Pay in lieu of nitice Kshs.19,440.00
 - iii. Compensation



The Claimant worked for the Respondent for about six years. From the record, he had a clean working record as no disciplinary incident have been cited by the Respondent. Taking into account is length of service, the manner in which his employment was terminated and all relevant factors under Section 49(4) of the Employment Act, I award the Claimant 10 months' salary as compensation in the sum of Kshs.194,400/-.

31. The Respondent shall issue a certificate of service to the Claimant.
32. The decretal sum shall accrue interest at Court rates from date of Judgment in respect of compensation and from the date of filing suit in respect of unpaid salary and pay in lieu of notice which were due and payable to the Claimant on the date of termination.
33. The Respondent shall also bear the Claimant's costs to this suit.
34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH 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

