



REPUBLIC OF KENYA



**KENYA LAW**  
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**Shiundu v Sal Kenya Limited (Cause 1631 of 2015)  
[2022] KEELRC 1752 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1752 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1631 OF 2015**

**JK GAKERI, J**

**MAY 11, 2022**

**BETWEEN**

**PATRICK MUKOYI SHIUNDU ..... CLAIMANT**

**AND**

**SAL KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a memorandum of claim dated 16<sup>th</sup> September 2015 and filed on 18<sup>th</sup> September 2015 alleging unfair/unlawful summary dismissal from employment and non-payment of terminal dues.
2. The Claimant prays for –
  - a. A declaration that the Respondent’s action to summarily dismiss the Claimant from employment was unlawful and unfair, and that the Claimant is entitled to payment of his terminal benefits and compensatory damages.
  - b. An order for the Respondent to pay the Claimant his terminal benefits and compensatory damages totalling to Kshs.401,504.20 comprising one month’s salary in lieu of notice, service/gratuity, house allowance and compensation for unlawful termination.
  - c. Interest on (b) above from the date of filing suit until payment in full
  - d. Costs of this suit plus interest thereon.
3. The Claimant’s case is that he was an employee of the Respondent from 6<sup>th</sup> May 2010 to 15<sup>th</sup> June 2015 as a supervisor in the cleaning department and his last salary was Kshs.17,300/- per month. It is averred that he was a diligent worker.



4. That the Respondent never remitted his NSSF and NHIF contributions from 6<sup>th</sup> May 2010 to October 2012 and was not paid any house allowance for the entire duration of his employment.
5. It is averred that on 14<sup>th</sup> May 2015, one Catherine Nderitu, the Respondent's Director called the Claimant requesting him to appear in the office on 15<sup>th</sup> May 2015. That upon meeting the Director, he was asked not to report to work for two weeks. That he reported back on 29<sup>th</sup> June 2015.
6. That attempts to see Mrs. Nderitu failed since she declined to see him and allegedly instructed the front office staff to advise the Claimant that his employment had been terminated.
7. That efforts to involve the Labour Office were unsuccessful.
8. It is the Claimant's case that his summary dismissal from employment was unlawful and unfair for failure to comply with mandatory provisions of the law, fair labour practices and principles of natural justice.

### **Respondent's Case**

9. The Respondent filed its memorandum of response on 14<sup>th</sup> April 2016. It avers that the Claimant was not registered with the NSSF and the NHIF and made no deductions from the Claimant's salary.
10. The Respondent denies having refused to pay the Claimant house allowance and avers that his salary was inclusive of house allowance.
11. The Respondent denies having terminated the Claimant from employment. The Respondent avers that due to complaints from one of its clients, it decided to transfer the Claimant from his work station to another and did a letter to that effect and upon transfer, the Claimant refused to report to the new work station and absconded duty and made a false complaint to the Labour Officer who found that the Claimant had not been terminated but had refused to report to work on being transferred.
12. Finally, the Respondent denies having breached the law, and prays for dismissal of the suit with costs.

### **Evidence**

13. The Claimant's statement rehashes the contents of the memorandum of claim. The Claimant testified that he was suspended by the Respondent for two weeks and was not paid and was subsequently terminated.
14. On cross examination, the Claimant told the Court that he was employed by the Respondent in May 2010 but had no evidence to establish that fact. That the NSSF statement on record had 1<sup>st</sup> November 2012 as the date of employment and contributions commenced in October 2012 and stopped in April 2015 and no payment was made in February 2013.
15. It was the Claimant's testimony that he was suspended for 14 days on 15<sup>th</sup> May 2015 and returned on 29<sup>th</sup> June 2015. The witness confirmed the duration was not 14 days. That on 29<sup>th</sup> June 2015, Mrs Nderitu was not in but directed him by phone to report to her assistant named Catherine and was suspended by the boss without being informed of the charges.
16. The Claimant confirmed that he was based at the Shujaa Mall and had a good working relationship with his colleagues. He denied having reported to work while drunk.
17. It was his testimony that he reported to the Labour Office on 1<sup>st</sup> July 2015 and the document he was given was not part of the record in Court. That he was not assisted.



18. The Claimant further confirmed that he did not receive the transfer letter and was not given a termination letter.
19. The Claimant further confirmed that he was a member of the NSSF.
20. He confirmed that his monthly salary was Kshs.17,300/- and did not include house allowance.
21. On re-examination, the Claimant testified that he was terminated by word of mouth and the Labour Officer did not notify him of the outcome of his complaint.
22. RW1, Catherine Nderitu adopted the witness statement and was cross examined. The witness confirmed having summoned the Claimant to her office on 14<sup>th</sup> June 2015 following a complaint by Shujaa Mall that the Claimant had reported to work while intoxicated. The client had requested a transfer of the Claimant but the witness had no evidence of the complaint or request for transfer.
23. That on 15<sup>th</sup> June 2015, the witness requested the Claimant to stay away for two weeks and was to report to a new client but did not report. The witness confirmed that the Claimant received the transfer letter but refused to sign the letter.
24. It was the witness's testimony that at the Labour Office the Claimant was advised to report to work.
25. That before 2012, the Claimant was a casual employee and the salary included house allowance since it was higher than the minimum wage. It was further confirmed that the Claimant was not terminated but absconded duty.
26. On re-examination, the witness testified that she was summoned by the Labour Officer following the Claimant's complaint and the Labour Office issued a letter dated 13<sup>th</sup> July 2015.

### **Claimant's Submissions**

27. The Claimant identifies two issues for determination:
  - i. Whether the Claimant was dismissed or absconded duty;
  - ii. Whether the claim is entitled to the reliefs sought.
28. As to whether the Claimant was dismissed or absconded duty, it is urged that although the Respondent testified that the Claimant absconded duty after being transferred, the Claimant testified that he did not receive the transfer letter dated 29<sup>th</sup> June 2015 since the letter had no acknowledgment by the Claimant.
29. That the Claimant ought to have been consulted before the transfer. The decisions in *Daniel Njuguna Mwangi v De La Rue Currency and Security Print Limited* [2017] eKLR and *James Ang'awa Atanda & 10 others v Judicial Service Commission* [2017] eKLR and others are relied upon to reinforce the submission.
30. In addition, it is submitted the Claimant testified that he did not abscond duty but was dismissed by one Mrs Nderitu without any valid reason or due process.
31. Similarly, the Respondent led no evidence on the steps it took to reach out to him and no notice to who cause was issued.
32. The decision in *Simon Mbiti Mbane v Inter Security Services Limited* [2018] eKLR and *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR are relied upon to demonstrate that the Respondent should have taken reasonable steps to contact the Claimant when he absconded duty.



33. It is further submitted that on a balance of probabilities, the Claimant was chased away and no letter of dismissal was issued.
34. Finally, the Claimant submits that the Respondent did not call the Labour Officer to confirm or deny the contents of the complaint dated 1<sup>st</sup> July 2015 and explain to the Court how he arrived at the decision that the Claimant was not dismissed.
35. The decisions in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR and *David Gichana Omuya v Mombasa Maize Millers Ltd* [2014] eKLR are relied upon in support of the submission on procedural fairness as provided by Section 41 of the *Employment Act*.
36. As regards prayers sought, the Claimant submits that he is entitled to pay in lieu of notice as no notice was given, service/gratuity for May 2010 to October 2012 when no NSSF deductions were made, house allowance as his salary did not include a house allowance and damages for unfair dismissal.

### **Respondent's Submissions**

37. The Respondent identifies the similar issues as the Claimant.
38. As to whether the Claimant was dismissed or absconded from employment, the Respondent relies on the evidence led by its witness, Catherine Nderitu about the complaint by the client and the discussion with the Claimant about it, the two weeks' leave and the alleged transfer to Mavuno Church.
39. That the letter was served on 29<sup>th</sup> June 2015 and the Claimant refused to acknowledge receipt. The Claimant admitted having had a meeting on 15<sup>th</sup> June 2016 when he was allegedly suspended/leave for two weeks for the Respondent to identify a place for him to be transferred to. That the Claimant was not terminated and the Claimant could not disclose who dismissed him or the actual date.
40. It is the Respondent's submission that the Claimant filed a complaint with the Labour Office but was not candid about the outcome yet there was documentary evidence on record of what transpired, casually testifying that he was not assisted. The complaint was filed two days after the transfer letter dated 29<sup>th</sup> June 2015 and the Claimant advocate's letter was served seven days after the Labour Officer's report which the Claimant denied receipt yet he was the complainant.
41. The decisions in *Nita Sangari Baldev v Milly Glass Works Limited* [2019] eKLR and *Republic v Kenya Marine & Fisheries Institute Ex-parte Ben B. Oisera* [2018] eKLR on the power of the employer to transfer an employee. The sentiments of Mbaru J. in *Henry Ochido v NGO Co-ordination Board* [2015] eKLR are also relied upon to urge that the Respondent had discharged its obligation of notifying the Claimant about the proposed transfer.
42. Section 47(5) of the *Employment Act* is relied upon to urge that the Claimant had not discharged the burden of proof as are Sections 107 and 108 of the *Evidence Act*. The decision in *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR is also used to reinforce the submission.
43. The decisions in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* [2021] eKLR are relied upon to urge that the Claimant has not established that he was dismissed and that the dismissal was unfair.
44. It is the Respondent's submission that according to the Claimant's pleadings, he met the Respondent's director on 15<sup>th</sup> May 2015 and was instructed not to report to work for two weeks and reported on 29<sup>th</sup>



June 2015. That the alleged date of dismissal on 15<sup>th</sup> June 2015 was a creation of the submissions and does not appear in any of the documents on record.

45. Finally, the Respondent submits that the authorities relied upon are distinguishable in that in this case, the Claimant refused to proceed on transfer, absconded duty and lodged a complaint with the Labour Officer.
46. As regards the reliefs sought, the Respondent submits that the Claimant is not entitled to pay in lieu of notice as his employment contract was not terminated. He refused to go on a transfer.
47. On service/gratuity, it is submitted that the Claimant testified that he was a registered member of the NSSF from November 2012 and provided a copy of the NSSF Statement.
48. On house allowance, it is submitted that RW1, the Claimant's salary included house allowance and the claim is not merited.
49. It is the Respondent's submission that no compensation due since the Claimant was not dismissed from employment and led no evidence of termination including the date or the person who terminated his employment.
50. The Respondent urges that the claim for compensation be dismissed.

### **Analysis and Determination**

51. The issues for determination are: -
  - a. Whether the Claimant was dismissed from employment or absconded duty;
  - b. Whether the Claimant is entitled to the reliefs sought.
52. As to whether the Claimant was dismissed from employment or absconded duty, the parties have adopted diametrically opposed positions basing their cases on the evidence on record. No doubt this case turns on this issue. While the Claimant submits that he was unfairly and unlawfully terminated, the Respondent's case is that the Claimant absconded duty after he refused to proceed on transfer from Shujaa Mall to Mavuno Church as directed by the Respondent.
53. On cross examination, the Claimant confirmed that he was suspended for two weeks on 15<sup>th</sup> May 2015, having been summoned by RW1 on 14<sup>th</sup> May 2015 through a phone call. That he reported back on 29<sup>th</sup> June 2015 and RW1 was not in and on calling her, he was directed to one Catherine, the Assistant to RW1. The written statement states that the several attempts to see RW1, after 29<sup>th</sup> June 2015 were fruitless. That RW1 advised front office staff to advise the Claimant that this employment had been terminated.
54. From the foregoing, it is undecipherable when the Claimant's employment was terminated and by who since the Claimant alleges that it was by word of mouth.
55. The Claimant reported to the Labour Office on 1<sup>st</sup> July 2015, was given a document to present to the employer, did so but did not file a copy in Court and testified that was not assisted.
56. RW1's evidence is that she summoned the Claimant to the office on 14<sup>th</sup> June 2015 to report on 15<sup>th</sup> June 2015 on which day he was advised to take a two weeks' leave for a new assignment.
57. He reported on 29<sup>th</sup> June 2015 and was given a transfer letter to Mavuno Church but never reported. The Claimant denied receipt of the letter.



58. Documentary evidence on record show that the Claimant and a colleague lodged a complaint with the Labour Officer on 29<sup>th</sup> June 2015. Their complaint was that they were unfairly dismissed on 29<sup>th</sup> June 2015. The compliant form appears to confirm the Claimant’s testimony that he forwarded the form to the Respondent for its action. The Respondent’s comment on the document is that the two had not been terminated and a copy of a letter dated 2<sup>nd</sup> July 2015 was attached. A phone number is included.
59. The Labour Officer’s comment on the form is as follows “I have established the gentlemen were not sacked, they were asked to resume working, however they declined.”
60. The Claimant did not deny the authenticity of the comments allegedly made by the Labour Officer or any of the handwritten comments or those of the letter dated 2<sup>nd</sup> July 2015. The document from the Labour Office solely confirms that the Claimant was an employee of the Respondent until 29<sup>th</sup> June 2015.
61. Puzzlingly, neither the memorandum of claim nor the written statement makes reference to the date of termination or by whom.
62. The front office personnel referred to by the two documents were well known to the Claimant but none is identified as having terminated the Claimant by word of mouth. Mrs Nderitu was not present on that day and the Claimant confirmed as much.
63. More significantly, the Claimant confirmed on cross examination that the Assistant did not assist him after he was directed by the boss, Mrs. Catherine Nderitu.
64. Intriguingly, the Claimant testified that he met Catherine Nderitu on 15<sup>th</sup> May 2015 and was instructed not to report to work for two weeks and returned on 29<sup>th</sup> June 2015 which he admitted was more than 14 days.
65. The only document that has a termination date are the Claimant’s submissions (which is not evidence) the date is 15<sup>th</sup> June 2015. It is unclear how the date was discerned as no testimony was led by the Claimant.
66. The Ministry of Labour, Social Security and Services letter dated 1<sup>st</sup> July 2015 mentions 29<sup>th</sup> June 2015 as the date of termination according to the Claimant’s complaint.
67. Section 45(2)(a) and (b) of the [Employment Act](#), 2007 provide that:
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
    - a. That the reason for the termination is valid.
    - b. That the reason for the termination is a fair reason.
      - i. Related to the employees conduct capacity or compatibility; or
      - ii. Based on the operational requirements of the employer and
    - c. that the employment was terminated in accordance with fair procedure.
68. The Respondent maintains that the Claimant’s employment was not terminated, that he absconded duty and thus has not laboured to justify any termination. However, even in cases of absconding of duty, the employer is bound to take the employee through a disciplinary process.
69. More significantly, the employer and employee must discharge their respective burdens of proof in cases of unfair termination, as is in the instant case.



70. Section 47(5) of the *Employment Act* provides that:
- (5) 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.
71. As regards proof, generally, Sections 107 and 108 of *Evidence Act* are the home port
- Section 107 provides that:
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- Section 108
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
72. The principle that he who alleges must prove has been reasserted in legions of decision and requires no emphasis.
73. In the words of D. K. Njagi Marete J. in *Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (supra)
- “It binds the claimants at the onset to bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost.
- The respondent’s case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under Section 47(5) of the *Employment Act*, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such ...”
74. The Court is in agreement with these sentiments.
75. It is the Court’s view that from the evidence on record, the Claimant has on balance of probabilities failed to discharge the burden of proof as articulated by the foregoing provision. He has neither proved that there was termination of employment nor that the termination was wrongful or unfair.
76. It is the finding of this Court that the Respondent’s evidence on record is not only cohesive and cogent but more believable as the concatenation of events preceding the Claimant’s complaint to the Ministry of Labour, Social Security and Services on 1<sup>st</sup> July 2015.
77. Having found that the Claimant has failed to discharge the burden of proof as ordained by Section 47(5) of the *Employment Act*, I now proceed to examine the next issue.
78. The issue as to whether the Claimant is entitled to the reliefs sought is inextricably intertwined with the issue of whether the alleged dismissal was unfair and having found that the Claimant did not prove that he was dismissed and that the dismissal was unfair, the Claimant is not entitled to the reliefs sought.



79. The absence of unlawful termination or summary dismissal from employment disentitles the Claimant to the reliefs sought.
80. Accordingly, the claim is dismissed for want of proof and parties shall bear own costs.
81. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

