



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Musili v Power Star Limited (Cause 1209 of 2017)  
[2022] KEELRC 4062 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4062 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1209 OF 2017  
M MBARÚ, J  
JUNE 30, 2022**

**BETWEEN**

**JONATHAN MUSYOKA MUSILI ..... CLAIMANT**

**AND**

**POWER STAR LIMITED ..... RESPONDENT**

**JUDGMENT**

1. On December 20, 2010 the respondent employed the claimant as a shelf stocker and deployed him at the respondent's supermarket in Ruiru but was not issued with a written contract of service. His salary was ksh.7, 000 per month.
2. In October, 2015 the claimant was transferred to the respondent's branch at Zimmerman as a supervisor and on November 7, 2015 he was moved to Kitengela as the branch manager.
3. On March 3, 2017 an employee of the respondent Joseph Mutunga at the Kitengela branch who had been deployed at the liquid petroleum gas station of the supermarket deserted work and the claimant immediately informed the respondent.
4. Following the desertion, the respondent's general manager Isaac Maina called the claimant and informed him that some gas cylinders were missing at the Kitengela branch. The claimant requested for a print out of sale of gas cylinders but this was not issued.
5. Together with one Francis Sempeta who usually relieved the deserted employees, the claimant reported the loss of gas cylinders to kitengela police station and recorded a statement. Investigating officer requested that the supervisor of the liquid petroleum gas section to record a statement but when the claimant informed the general manager, he declined.



6. On March 21, 2017 the claimant reported to work and got a call from the general manager who informed him that his employment was terminated due to the loss of the gas cylinders and when the claimant requested to have a meeting with the manager he declined.
7. The claim is that the claimant had not committed any misconduct and acted in the course of his duty and attended as required. Termination of employment was awful and unfair and is seeking the following;
  - a. Pay for days worked ksh.40,384.62;
  - b. Work during public holidays ksh121,149;
  - c. Pay in lieu of taking leave ksh.10,095.75;
  - d. House allowance Ksh.562,500;
  - e. Compensation ksh.600,000; and
  - f. Costs of the suit.
8. The claimant testified in support of his case that upon employment by the respondent he worked diligently until March 21, 2017 when he reported on duty he was called by the general manager and who dismissed him from his employment without given him notice, a hearing or giving him any justifiable cause..

### **Response**

9. The response is that in March, 2017 the respondent discovered that 88 gas cylinders valued at ksh.341, 800 were missing at the gas section where the claimant was in charge. The respondent also discovered that 120 kilograms of gas were missing valued at Kshs.12, 360. The loss of cylinders and gas had not been reported by the claimant to the respondent and the respondent therefore directed the claimant to report the matter to the police.
10. The claimant reported the matter to police but the suspect was released without the claimant consulting with the respondent before he withdrew the case with the police. The respondent directed the claimant to produce the lost cylinder and gas or have the suspect who stole arrested and charged in court but he failed to attend and opted to desert duty. The claims made should be dismissed with costs.
11. Isaac Maina testified that branch manager at Kitengela and worked with the claimant at the material time when gas and cylinders got lost and instead of the claimant addressing he went to the police station and had the suspect released before he could be charged. The claimant who was then the branch manager had the right to hire employees and he had hired the employee who was on duty when the gas and cylinder got lost. The respondent has incurred huge costs.
12. Mr Maina also testified that when the claimant was directed to have the employee apprehended or to produce the missing gas and cylinder, he absconded duty. He never reported back on duty. He has not paid for the loss of gas or the cylinders.

At the close of the hearing, both parties filed written submissions.

### **Determination**

13. The claimant worked for the respondent form the year 2010 to 2017 when he is said to have deserted duty following loss of gas and cylinders while he was the branch manager at Kitengela. There is no written contract of employment and the respondent has not filed any work records.



14. Section 8 and 9 of the *Employment Act*, 2007 (the Act) allow the employer to employ an employee under an oral contract but under section 10(2) of the *act*, the employer is required to issue such an employee with a written contract of service when the employee remains in the service for a period exceeding two months.
15. Also, where a suit such as one herein is filed, the employer has the legal duty to file all work records pursuant to Section 10(6) and (7) of the *act*. Such duty does not change even where the employee is the one who moves the court first.
17. In this case, the respondent has no written contract for the claimant and has not filed any work records. It is the word of the claimant against the respondent. The court must believe the employee in such circumstances.
18. Where an employee is of misconduct or gross misconduct, the employer is allowed to terminate employment save the employee is protected under the provisions of section 41 of the act;
  - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation
19. Whether the employee is of misconduct or gross misconduct, the employer must accord such an employee the due process of the law pursuant to section 41 of the *act*. To effect summary dismissal on alleged desertion of employment is an unfair labour practice

#### **Did the claimant desert duty?**

20. Where the employer alleges that an employee has deserted duty, the employer must discharge its burden in proving that an employee has absconded duty. Case law has firmly established that an employer alleging that an employee has absconded duty is required to show efforts made to reach out to the employee with a view to putting them on notice that termination of their employment on this ground is being considered *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR and in *Dickson Matingi v Db Schenker Limited* [2016] eKLR that;

It is not enough for an employer to state that an employee has deserted duty and on that basis proceed to dismiss. Desertion is a form of gross misconduct which must be proved.

Apart from stating that the claimant had deserted duty, the respondent made no effort to prove its assertion and the court therefore rejects this line of defence.
21. Ultimately, the court finds the termination of the claimant's employment through a summary action of the respondent was unfair and without justification. The respondent failed to follow the due process of the law.
22. For days worked, the claimant cannot be denied his wages. The sum of ksh.40, 384.62 is due.
23. The claimant is seeking pay for work during public holidays. Such public holidays are all gazetted and not general. These are not particularised.
24. On the claim for pay in lieu of taking leave, such is due under the provisions of section 28 of the *act*. The sum of ksh.10, 095.75 is due to the claimant.
25. The claimant is seeking payment of house allowance for the duration of employment.



26. As noted above, the claimant had no written contract. The employment as branch manager is not regulated under any contract save, without any written contract, the terms applicable to general wage orders and employee apply. The claimant was last earning a wage of Ksh.50, 000 which wage is over and above the minimum wage due to an employee on oral terms contract.
26. On the findings that there was unfair termination of employment compensation is due. A compensation for 3 months wages is hereby found appropriate all at ksh.150, 000.
27. On his written submissions, the claimant is seeking damages for defamation. Such matter was not pleaded to allow the respondent a fair chance to respond.
28. A certificate of service shall issue to the claimant for the period of service pursuant to section 51 of the *act*.
29. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
  - a. Employment terminated unfairly;
  - b. Compensation ksh.150,000;
  - c. Pay for days worked ksh.40,384.62;
  - d. Pay in lieu of taking leave Ksh.10,095.75;
  - e. Certificate of service shall issue; and
  - f. Costs of the suit.

**DELIVERED IN COURT AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Peter Kigotho

..... and .....

