



**Omuit v Texas Alarms [K] Ltd (Cause 894 of 2017)
[2022] KEELRC 1098 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1098 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 894 OF 2017**

**AK NZEI, J
JUNE 23, 2022**

BETWEEN

CORNEL INGURA OMUIT CLAIMANT

AND

TEXAS ALARMS [K] LTD RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent on 1st December 2017 vide a memorandum of claim dated 30th November 2017 and pleaded that he was employed by the Respondent as a security guard on 5th September 2009 and worked until March 2016 when the Respondent terminated his employment without any lawful or justified cause and without any warning letter.
2. The Claimant further pleaded that during the time of service, the Respondent was supposed to pay the Claimant:-
 - a) Basic salaryksh.11,400
 - b) House allowanceksh. 1,710
 - c) Annual leaveksh. 11,400
3. The Claimant sought the following reliefs: -
 - a) House allowance with effect from 5th September 2009 to March 2016 (11,400x15/100x12) x7 yearsksh.143,640
 - b) One month salary in lieu of noticeksh.11,400
 - c) Unpaid public holidaysksh.61,385
 - d) Unpaid leave allowance (11,400x7).....ksh.79,800



- e) Compensation for unfair termination of employment (11,400x12 months)ksh.136,000
- f) Punitive damages.
4. The Claimant also filed his written witness statement and a list of documents dated 30th November 2017, both of which accompanied the memorandum of claim. Documents listed on the list of documents included a demand letter dated 30th March 2017, a dispatch note (No. 5576) dated 5th September 2009 and a stores Issues Book (receipt) dated 4th April 2020.
5. The Respondent entered appearance on 24th August 2018 and subsequently filed a Response to Claim on 25th September 2018 and pleaded:-
- a) that the Claimant was employed on 9th October 2015 at a salary of ksh.11,400 per month and worked until 6th March 2016 when he was arrested by the police due to a theft incident at Tiles & Carpets Mombasa; and never reported back to work.
- b) that the Claimant's employment was not terminated by the Respondent.
- c) that the Claimant deserted duty and still holds the Respondent's uniform and equipment which need to be returned to enable the Respondent to pay the Claimant's dues.
- d) that the Claimant was paid leave days and public holidays.
6. The Respondent further filed a witness statement by one Bernard O. Aduda dated 21st February 2019 and a list of documents dated the same date. Documents listed on the Respondents list of documents are the said witness employment card and the Claimant's letter of employment dated 9th October 2015.
7. On 24th May 2021, the Respondent filed a further statement of the said Bernard O. Adunda dated 17th May 2021 and a supplementary list of documents dated the same date. Documents listed on the Respondent's supplementary list of documents included the Claimant's application for employment dated 28th August 2015, a letter by Dennis O. Barasa dated 1st September 2015, the Claimant's declaration dated 7th September 2015 and a bunch of the Claimant's five payslips for the months of October 2015, November 2015, December 2015, January 2016 and February 2016.
8. When trial opened on 16th December 2021, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents listed on his list of documents.
9. The Claimant testified that he was employed by the Respondent in 2009 and applied for unpaid leave in 2015 in order to take care of his father who had been involved in an accident in 2015, and that when he went back to work, the Respondent told him to apply for his job afresh.
10. The Claimant further testified that his salary was ksh.11,000 and that he was paid ksh.5000 advance and ksh.6000 at the end of the month and was not issued with payslips. That he was not allowed to take leave and was not paid house allowance and no allowance was paid for working on public holidays.
11. It was the Claimant's further testimony that his employment was terminated in March 2016 and no reason was given for the termination, and was neither issued with a termination letter nor subjected to any disciplinary process. That he did not desert duty and was not arrested by police as alleged by the Respondent.
12. Cross-examined, the clamant testified that his last working day was 6th March2016, and that there was no theft at Tiles and Carpets where he worked as a daytime guard, and that it was his supervisor who told him to go home and took away his uniform. That he was not arrested by the police.



13. The Respondent called one witness, Bernard O. Adunda (RW-1), who told the Court that he was the Human Resource Manager at the Respondent company. The witness adopted his two filed witness statements as his testimony, and produced in evidence the documents listed on his list of documents and supplementary list of documents.
14. RW-1 testified that the Claimant applied for employment on 28th August 2015, and furnished the Respondent with all the required documents including a letter from his referee, one Barasa. That the Claimant's exhibit no. 2 (dispatch note no. 5576 dated 5th September 2009) was a forgery as the same was not signed by the Respondent's Operations Manager as required, and the signatures on it were not by any of the Respondent's staff. RW-1 further testified that the Claimant's exhibit no. 3 shown to be dated 4th April 2020, was not the Respondent's document. That the Claimant was employed on 9th October 2015 and he left on 6th March 2016 when he was arrested by the police due to a theft incident at Tiles and Carpets where the Claimant was guarding.
15. It was the Respondent's (RW-1's) further testimony that the Claimant was being paid ksh.380 per day as a casual and that this was inclusive of house allowance as per the payslips exhibited by the Respondent and that the Claimant was entitled to pro-rata leave, which was about ksh.6,000. RW-1 testified that the Claimant was not terminated by anybody but left employment.
16. Cross-examined, RW-1 testified that the Claimant earned ksh.11,400 per month, and that the payslips produced by the Respondent were for the first two weeks of each month, and showed a house allowance of ksh.24 per day; and that the Claimant did not take leave for the period that he worked for the Respondent.
17. It was RW-1's further evidence that the Respondent had nothing to show that any (theft) incident happened at Tiles and Carpets; and that the Respondent did not take any action after the Claimant deserted duty, and never reported the matter to the Labour Officer.
18. Parties did not file a joint statement of issues. Upon consideration of the pleadings filed and evidence adduced by both parties, issues that emerge for determination are as follows:-
 - a) Whether the Claimant was employed by the Respondent in 2009 or on 9th October 2015.
 - b) Whether the Claimant's employment was terminated by the Respondent.
 - c) Whether termination employment was unlawful.
 - d) Whether reliefs sought by the Claimant are deserved.
19. On the first issue, the Claimant never denied having applied for employment with the Respondent on 28th August 2015, having furnished the Claimant with his referee's letter dated 1st September 2015 (by Dennis O. Barasa), having signed a declaration on 7th September 2015 and having signed a letter of employment (contract of the employment) on 9th October 2015. The Claimant did not demonstrate that he had a valid and running employment contract with the Respondent prior to 9th October 2015. I find and hold that the Claimant was employed by the Respondent on 9th October 2015.
20. On the second issue, the Claimant pleaded and testified that his employment was terminated by the Respondent on 6th March 2016 when the supervisor told him to go home and took away his uniform. On the other hand, the Respondent pleaded and testified that the Claimant deserted employment after his arrest by the police on 6th March 2016 following a theft incident at Tiles and Carpets in Mombasa where the Claimant was guarding. The Claimant denied any occurrence of theft at Tiles and Carpets, and denied having been arrested by the police.



21. The Respondent did not adduce any evidence in support of the allegation that there was a theft incident at Tiles and Carpets under the Claimant's watch, that such incident was reported to the police, and that the Claimant was arrested by the police. If at all there was such an incident, the Respondent would have had no difficulties in availing in evidence details and particulars of the report made to the police (police OB No.) and evidence of the Claimant's arrest by the police. No evidence was called from the police in that regard. I reject the Respondent's unsubstantiated narrative that the Claimant deserted duty after being arrested by the police.
22. The Respondent did not tell the Court what action it took if at all the Claimant deserted or absconded duty. It was held in the case OF GODFREY ANJERE -VS- UNIQUE SUPPLIES LIMITED [2015] eKLR as follows:-
- “In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control and yet unable to communicate to the employer in good time.”
23. It was also held in the case of Stanely Omwoyo Onchweri v Bom Nakuru Ymca Secondary School [2015] eKLR(cited In James Aswiebi Namayi v Mengengai Oil Refineries Ltd [2016] eKLR, that:-
- “the employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues or family members) issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”
24. In the present case, the Respondent did not even demonstrate that it contacted the Claimant's referee, whose details they had, to find out the Claimant's whereabouts. I find and hold, on a balance of probability, that the Claimant's employment was terminated by the Respondent on 6th March 2016.
25. On the third issue, it was not demonstrated that the Respondent complied with the mandatory procedural requirements of Section 41 of the *Employment Act* in terminating the Claimant's employment. Section 41 of the *Employment Act* provides:
- “(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.
- (2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
26. It was held in the case of Kenfright [E.A] Limited -vs- Benson K. Nguti [2016] eKLR as follows: -
- “apart from issuing a proper notice according to the contract (or payment in lieu of notice provided), an employer is duty bound to explain to an employee, in the presence of another



employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken....We come to the conclusion and find, in agreement with the trial Judge, that the termination of the Respondent's contract of service in the circumstances, was unfair, the payment in lieu of notice notwithstanding..."

27. Further no reasons, valid or otherwise, were given by the Respondent for terminating the Claimant's employment. Termination of the Claimant's employment by the Respondent was procedurally and substantively unfair. I so find and hold.
28. On the fourth issue, and having found that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of nine month's salary being compensation for unfair termination of employment. This will be ksh.11,400x9 = ksh.104,600.
29. The claim for house allowance is declined as the payslips produced by the Respondent indicated that the Claimant's earnings, computed at ksh. 380 per day, were inclusive of house allowance. The Claimant did not question the validity or accuracy of the said payslips. Further, the Claimant did not plead, and did not demonstrate that his minimum daily earnings and house allowance ought to have been higher than the amount indicated on the payslips.
30. The claim for one month salary in lieu of notice, kshs 11,400, is allowed. The Respondent did not demonstrate that any termination notice was served on the Claimant.
31. The claim for leave allowance is allowed at ksh.6,000, being the amount admitted by the Respondent as being due to the Claimant in leave allowance on pro-rata basis. I have already made a finding that the Claimant was employed by the Respondent on 9th October 2015, and that his employment was terminated by the Respondent on 6th March 2016.
32. The claim for unpaid public holidays is declined as the same was not specifically pleaded, and was not proved. An employee seeking payment for work done on public holidays ought to specifically plead the specific public holidays worked and demonstrate that he, indeed, worked on those dates. It is not sufficient to just make a general claim and/or allegation.
33. Finally, judgment is hereby entered in favour of the Claimant against the Respondent for:-
 - a) nine months' salary being compensation for unfair termination of employmentksh.104,600
 - b) one month salary in lieu of noticeksh.11,400
 - c) Pro-rata leave allowanceksh.6,000Total ksh. 122,000
34. The Claimant is also awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23rd DAY OF JUNE 2022

AGNES KITIKU NZEI

JUDGE

ORDER



In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Nyamboye for Claimant

Miss. Munyari for Respondent

