



**Otieno v South Nyanza Sugar Company Limited (Cause 58 of 2021)
[2022] KEELRC 1109 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 58 OF 2021
CN BAARI, J
JUNE 23, 2022**

BETWEEN

EZEKIEL OKUMU OTIENO CLAIMANT

AND

SOUTH NYANZA SUGAR COMPANY LIMITED RESPONDENT

JUDGMENT

1. In a Statement of Claim dated 3rd August, 2021, and filed on 19th August, 2021, the Claimant seeks payment of 8 months' salary, overtime pay, leave allowance, holidays, unlawful termination, payment in lieu of notice and house allowance, all amounting to Kshs.3,940,000.00
2. The Respondent in a response to the Claimant's claim dated 24th September, 2021, and filed on 29th September, 2021, wholly denied the Claimant's claim
3. The suit was heard on the 2nd of February, 2022. The Claimant testified in support of his case, and further presented one Gilbert Nyabande Otieno to testify in support of his claim.
4. The Respondent presented a Mr. Stock Ochieng Ouma to testify in support of her case.
5. Both parties filed submissions in the matter.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in May, 2015, as a fitter in the Mechanical Department. It is his further case that on the 6th of November, 2015, he signed a contract of employment with the Respondent for the same position of fitter for a further period of 6 months.
7. It is the Claimant's case that the contract provided for payment of Ksh700.00 daily, which amounted to Kshs.14,700.00 per month and which pay was made at the end of each month.



8. It is the Claimant's case that he worked in between his contracts even without a formal/written contract. The Claimant states that he signed two other contracts similar to the earlier ones dated 9th November, 2017 and 10th November, 2018.
9. The Claimant states that during his entire period in the employment of the Respondent, he worked both day and night on every Thursday of the week, and all weekends and was never compensated for the extra working hours.
10. It is the Claimant's case that he worked ceaselessly without leave until January, 2019. He states that he requested to take his leave, which request was granted but was immediately recalled to take over a shift from another employee who had also gone on leave. It is the Claimant's case that he fell ill and wrote a letter to his supervisor requesting for sick leave, which he sent through his colleague.
11. The Claimant's case is that in August, 2019, he found out that he had been terminated when he reported to work and was told that he had no job. The Claimant states that he was instructed to see his supervisor over his job status, but the supervisor sent him to the mill Engineer. He states that he was tossed between managers of the Respondent, and finally informed by the Respondent's Human Resource Officer that his case will be heard on a date to be communicated.
12. It is the Claimant's further case that the parties herein tried conciliation in an effort to resolve the dispute, but that the conciliation process did not work prompting him to file the instant suit.
13. On cross-examination the Claimant told the court that his last contract with the Respondent was to lapse on 31st March, 2019. He further stated that his last day at work was 1st August, 2019.
14. On cross-examination the Claimant admitted that he did not have evidence to show that he worked over time.
15. The Claimant confirmed on cross-examination that he was paid Kshs.80,000 instead of the Kshs.146,000/- which he was owed in salary arrears. He also told the court on cross-exam, that he did not have evidence showing how much he is owed by the Respondent. He clarified that the amount he seeks under housing allowance is actually Kshs.204,000 and not Kshs.2,000,000.00/- indicated in his statement of claim.
16. The Claimant clarified on re-examination that he continued working even after his contract had lapsed. He further states that he did not resign from the service of the Respondent, and neither did he receive a termination letter.
17. CW2 told the court that he received a request for leave from the Claimant and that he handed it to the Respondent's Mill-Supervisor. He further stated that he does not know whether the Claimant was granted the sick-leave that he requested for.

The Respondent's Case

18. The Respondent's case is that the Claimant was employed on a contract of six months at a daily skilled rate of Kshs.700/= and that the contract was renewable at the option of the Respondent on a need basis. It is the Respondent's further case that the last contract the Claimant had with them was to lapse on the 13th of August, 2019.
19. It is the Respondent's contention, that she did not terminate the Claimant's employment, instead, it was the Claimant who terminated his employment when he, towards the end of his contract, opted to abscond his duties, without any formal communication to the Respondent, only to appear one year later with a notice from the labour officer.



20. It is the Respondent's further case that the Claimant's current claims were already subjected to various conciliatory meetings and conclusions made in relation to each of the claims. The Respondent contends that the meetings were attended by both parties, and the resulting conclusions were consented to by the Claimant.
21. It is the Respondent's case that the Claimant was paid for all the overtime worked and that the payment is evidenced by the pay slips produced before court. The Respondent further states that the Claimant's daily wage was consolidated to include house allowance and further that the only time the Claimant was not paid house allowance, is when he was housed by the employer.
22. The Respondent contend that the resolution from the conciliation was that the Claimant be paid Kshs.106,400/-less one month salary in lieu of notice and that the salary arrears related to the months of February to July, 2019. The Respondent states that the Kshs.106,400 comprised leave entitlement and public holidays worked.
23. The Respondent's witness (RW1) confirmed that the Claimant worked with the Respondent non-stop between 2015 and 2019 and that all this time, he signed various contracts.

The Claimant's Submissions.

24. It is submitted for the Claimant that he was unfairly terminated for not being given reasons for his termination contrary to Section 45(4) of the *Employment Act*.
25. The Claimant submits that his termination is unfair as the Respondent failed to adhere to the provisions of Section 41 of the *Employment Act*, 2007 on termination/Dismissal procedures.
26. The Claimant further submits that contrary to the Respondent's assertions, no agreement had been reached in the conciliation meeting as alleged, and that no conciliation agreement signed by the parties was produced in evidence before Court.
27. It is submitted that the Claimant is entitled to the remedies sought as the claims are statutory entitlements which the Respondent failed and/or neglected to pay at the time of the parties' separation.

The Respondent's Submissions.

28. The Respondent submitted that none of her actions in relation to her separation with the Claimant amount to unlawful termination of the Claimant's employment as is alleged, and as such submit that the Claimant is not entitled to the reliefs claimed in his Memorandum of Claim.
29. It is submitted for the Respondent that upon discharge from hospital an employee has the legal duty to submit a medical certificate signed by a medical practitioner to the employer. The condition of notification and submission of a medical certificate are mandatory and which conditions the Claimant did not meet. It is submitted that neither was there a request as at that time the Claimant went on sick-leave, nor a certificate by a doctor.
30. The Respondent submitted that it is the Claimant who absconded duty and is thus not entitled to the remedies sought. It is further submitted that vide a conciliation agreement reached between the parties, the issues in this case were resolved as agreed.

Analysis and Determination

31. I have considered the pleadings, the witnesses' testimonies and the rival submissions. The issues for determination are:



- i. Whether the parties herein separated by termination or absconding or duty, and whether the separation was within the law.
 - ii. Whether the Claimant is entitled to the reliefs sought.
Whether the parties separated by termination or absconding of duty, and whether the separation was within the law.
32. It is not disputed that the Claimant was in the service of the Respondent between the year 2015 and 2019. What is in dispute is how the Claimant left the service of the Respondent. The Respondent contend that she never terminated the Claimant, and the Claimant asserts that though no termination letter was issued, he was terminated by the fact that he reported to work and was informed that he no longer had a job with the Respondent.
33. The Respondent told the court that the Claimant absconded duty from 29th July, 2019. The Claimant on his part told the court that he had fallen ill and sought sick leave vide a letter he wrote to the Mill supervisor which he transmitted through his colleague and neighbour, one Gilbert Nyabande Otieno, whose testimony before court confirmed this to be the position.
34. The Respondent through their witnesses asserted that the Claimant did not follow laid down procedures for grant of sick leave and therefore his absence could only be treated as an abscondment of duty.
35. The Respondent contend that by dint of Section 44 of the *Employment Act*, absence from duty is an act of gross misconduct that warrants summary dismissal, and which formed the basis upon which she dismissed the Claimant.
36. It is therefore true to say that for reason that the Claimant left the employ of the Respondent on the ground of absence from duty, the separation arose by summary dismissal notwithstanding that no letter of dismissal was issued, and not by absconding of duty. Absence from duty was the reason upon which the dismissal was premised
37. I find and hold that the Claimant was summarily dismissed from the service of the Respondent on account of absence from duty.
38. The next issue for determination is whether the Claimant's dismissal was unfair. A determination of fairness or lack thereof in a dismissal from service, is a question of adherence or lack thereof by the Employer to the rules of natural justice and the substantive justification test.
39. Fair hearing is both a statutory and constitutional requirement which is mandatory irrespective of the reason an employer may have for dismissing an employee. In cases of summary dismissal such as this, apart from the employer justifying the real reasons for dismissal, the right to be heard in summary dismissal cases is unassailable and absolute.
40. Section 4 of the *Fair Administrative Actions Act* states:
 - “(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - (a) attend proceedings, in person or in the company of an expert of his choice;
be heard;



- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

41. The Respondent in this matter assumed that by the fact that the Claimant did not resume work for whatever reason, she deemed him summarily dismissed by reason of absconding duty. The Respondent ought to have given the Claimant a hearing in accordance with Sections 41 of the *Employment Act* and 4 (4) of the Fair Administrative Actions Act, contrary to the Respondent submission and reliance in the decision in *Ann Njoroge v Topex Petroleum Limited*, Cause No. 1248 of 2012.
42. The Respondent being the employer of the Claimant, ought to have issued him with a show cause letter explaining why she was considering dismissal. The Respondent made no attempt to follow the laid down statutory dismissal procedures. The Claimant was not issued a show cause letter, notice of a hearing or even a dismissal letter to notify the Claimant that he had been dismissed. All the Claimant got is verbal information that he no longer had a job, a statement he had to go from one manager to another to receive.
43. The Respondent signed contracts with the Claimant from time to time to signify their formal employment relationship. The separation could only have been handled in similar fashion and nothing less.
44. Although the Respondent told the court that the Claimant’s contract had lapsed, RW1 confirmed the Claimant’s assertion that he continued working even after his contract had lapsed, and that this happened severally in between his contracts in his time in the service of the Respondent.
45. I find and hold that notwithstanding the fact that the Claimant’s dismissal was made pursuant to Section 44 of the *Employment Act*, 2007, the Claimant is entitled to procedural fairness. The Court of Appeal in the case of *Kenfreight (EA) Limited v Benson K Nguti* [2016] eKLR stated:
- “The employer must also prove that the termination was in accordance with fair procedure...”
46. I find and hold that the dismissal of the Claimant failed the procedurally unfairness test.
47. The question of substantive justification is concerned with the reasons for which an employee is dismissed. Sections 43, 45 and 47(5) of the Employment, 2007 requires that an employer must prove the reasons for dismissal, prove the reasons are valid and fair and prove that the grounds are justified. In the case of *Kenfreight (EA) Limited v Benson K Nguti* (*Supra*) the court held:-
- “It is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer.”
48. It is now settled that the sanctions given to an employee for misconduct must be reasonable. That where reasons are not outlined, any sanction given becomes unfair.
49. The Respondent told the court that the Claimant absconded duty, and which is the reason he was dismissed from the service of Respondent. The Claimant denied absconding duty, but admitted having fallen ill and could not report to work. He told the court that he sent a letter through his colleague seeking sick leave.



50. The Respondent clarified the process that the Claimant ought to have followed for approval of sick leave. It is evident that the Claimant did not adhere to the Respondent's policy on grant of leave but the Respondent also failed in not outlining the reasons for dismissing the Claimant.
51. The manner in which the Respondent dismissed the Claimant does not meet the just cause standard set under Sections 43, 45 and 47 of the *Employment Act*, 2007.
52. I find and hold that the Claimant's dismissal did not meet the substantive justification test.
53. The dismissal is both procedurally and substantively unfair

Whether the Claimant is entitled to the reliefs sought.

54. The Claimant seeks payment of 8 months' salary, over time pay, leave allowance, holidays, compensation for unlawful termination payment in lieu of notice and house allowance.

Compensation for Unlawful Dismissal

55. Sections 49 and 50 of the *Employment Act* entitles employees whose termination/dismissal is found to be unfair to compensation. In the case of *Kenya Ports Authority v Festus Kipkorir Kiprotich* [2014] eKLR, it was held that the measures of compensation should be guided by the statutory capping at the time of termination. The statutory capping for compensation is twelve months' salary.
56. Further, in the case of *Alphonse Magbanga Mwachanya v Operation 680 Limited* [2013] eKLR the Court held that in determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act*
57. The Claimant herein did not follow proper procedure in seeking grant of sick leave. He sent a letter through a colleague and never bothered to find out whether his leave was approved or not. In circumstances, the Claimant largely contributed to his dismissal from the service of the Respondent, and for this reason I award him five (5) months' salary in compensation for unfair dismissal.

House Allowance

58. The Claimant told the court that he was never paid a house allowance for the time he was in the service of the Respondent. Instead, money was deducted from his pay slip for the durations he lived in the Respondent's quarters.
59. The pay slips produced in evidence only indicate salary to be basic salary, and not consolidated salary as alleged. Section 31 of the *Employment Act*, 2007, provides for employee housing as follows:

“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

This section shall not apply to an employee whose contract of service—

- a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation;...



60. For reason that the Claimant's salary as indicated in the pay slips is not consolidated, and the pay slips produced do not show that house allowance was paid, I hold that the Claimant is entitled to payment of housing allowance.
61. The Claimant claims housing allowance at Kshs.4000/- per month while the Respondent told the court that the house allowance payable to the Claimant is Kshs.2000.
62. The General Order provides for 15% of the basic salary as housing allowance in addition to basic salary, if free housing is not provided. The Claimant's daily wage is Kshs.700 and Kshs.21,000 per month.
63. I award the Claimant house allowance for the four years (4) and three months (3) he was in the service of the Respondent at 15% of the basis salary in accordance with the General Order. amounting to Kshs.3,150/- per month.

Over Time Pay

64. The pay slips produced before court indicate that that Claimant was paid over time for the months he worked beyond working hours. For this reason, the claim for overtime pay is dismissed.

Leave and Holiday Allowance

65. Leave and holiday allowances were not proved. Holiday allowance could also be inclusive in the overtime pay. The claim is dismissed.

Pay in lieu of notice

66. The Claimant was evidently not issued with dismissal notice or pay in lieu thereof. He is awarded one-month salary in lieu of notice at Kshs.21,000/-
67. In whole, Judgment is entered for the Claimant against the Respondent in the following terms:
 - a. 5 Months' salary in compensation for unfair dismissal at Kshs.105,000/-
 - b. House allowance at Kshs.160,650/-
 - c. One Month salary in lieu of notice at Kshs.21,000/-
 - d. The Claimant will also have the costs of the suit and interest until payment in full.

68. Judgement accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Musando h/b for Mr. Amondi for the Claimant

Ms. Odhiambo present for the Respondent

Christine Omollo- C/A

