



**Mohamed v Jamia Food Mart Limited (Cause 152 of 2016)
[2022] KEELRC 1423 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 152 OF 2016
HS WASILWA, J
JUNE 21, 2022**

BETWEEN

BATULI MOHAMED CLAIMANT

AND

JAMIA FOOD MART LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this claim on the 3rd may, 2016 alleging to have been unfairly terminated from employment and seeking for compensation for the unfair termination.
2. The background of this case is that the Claimant was employed by the Respondent sometimes in December, 2010 as a cashier earning a monthly salary of Kshs 9,000 which was increased in the year 2012 to Kshs 14000, a salary which she earned till her termination in November, 2014. She contends that she was underpaid throughout her tenure with the Respondent.
3. She avers that she reported to work at 7 am and clocked out at 7pm every day of the week without taking any rest days or leave as envisioned under the *Employment Act*. Therefore, that she ought to have been paid overtime which was not done. She also avers that she worked during holiday and never took her leave days.
4. It is the Claimant's case that she worked for the Respondent diligently until November 2014 when she was dismissed from employment without notice or disciplinary process.
5. The Claimant therefore prays for the following reliefs; -
 - a. Underpayment of Kshs. 292,968.60
 - b. Overtime payment of Kshs 672,554.
 - c. Annual leave payment of Kshs 75,868.30



- d. Holiday payment of Kshs 26,510.80
 - e. Salary in lieu of Notice of Kshs 20,770
 - f. November, 2014 salary of Kshs 20,770
 - g. General damages for the unfair termination.
6. The Respondent entered appearance on the 30th May, 2016 and filed a response to claim and counterclaim on the 23rd June, 2016 admitting to employing the Claimant as pleaded and avers that the Claimant was not dismissed as alleged rather that she deserted work after being charged for stealing by servant at Nakuru chief Magistrates Court under CR Number 3488 of 2018.
 7. The Respondent avers that the Claimant having stolen from it was guilty of gross misconduct under section 44(4) of the *Employment Act* and liable for summary termination but that after the issue of theft was raised and the Claimant charged she absconded duty and never reported to work.
 8. It is averred that the Claimant worked on two shifts from 7am to 10pm which she was fully compensated for. It is also stated that all the Respondent's employees were entitled to one month leave during the month of Ramadhan when the restaurant was closed for a whole month.
 9. On the issue of notice and disciplinary process, the Respondent avers that the Claimant absconded duty and therefore could not be served with a notice or subjected to disciplinary hearing.
 10. It is stated that during the pendency of the Claimant's employment, the Claimant on various dates between January, 2012 and 10th November, 2014 fraudulently converted the Respondent money amounting to Kshs 923,905 for her own use.
 11. The particulars of fraud was that the Claimant deleted orders/accounting documents in the point of sale system, doctored sale records to suit her desires and destroyed the physical order receipts occasioning the Respondent immense loss which the Respondent now counterclaims.
 12. The Respondent also avers that it incurred a cost of Kshs 50,000 to pay the auditor who carried out the audit that unearthed the fraudulent act of the Claimant, which the Respondent also counter claims.
 13. The Respondent prays for the Claimant case to be dismissed and the counter claim be allowed as prayed.
 14. The Claimant filed a response to defence and counterclaim on the 6th July, 2016 and admitted to have been charged in CR 3488 of 2014 but contends that the same is pending before the Court. She further denied all the other contends of the defence and counterclaim.

Hearing.

15. The Claimant testified as CW-1 and adopted her witness statement dated 16.1.2018 and produced the list of document dated 27.4.2016 and a further list dated 16.1.2018. She testified in addition that she was terminated from employment on account of lost money without notice or being subjected to disciplinary process. She also stated that she was acquitted of the charges of stealing per servant. She further denied creating a pseudo account or destroying Bills. It was her testimony that she was the one with the password of the system together with one of the director and the manager of the Respondent. She also avers that she was never interrogated by the said auditor neither was she shown a copy of the audit report



16. Upon cross examination by Ochola Advocate, the Claimant testified that she was earning Kshs 9,000 at the beginning of her employment. She stated that she was not given an opportunity to explain herself on the alleged loss of funds. She stated that she was arrested on the 21.4.2014 and released on bond however that she was acquitted on the 8th December, 2017. She further testified that she never secured another job after the dismissal and in 2017 she opened a shop to cater for her daily needs. She maintains that she never absconded that but that she was fired.
17. On re-examination, the Claimant avers that she was not issued with any documents to show her employment terms, be it an employment letter or payslips and their engagement was verbal.
18. The Respondent called three witnesses; Khatete Ashuruma, Ibrahim Isaack and Mohamed Ibrahim.
19. Hirolido Khatete Ashuruna was the Respondent RW-1. He testified that he is an auditor by profession and on 13th November, 2014 he was retained by the Respondent' Director Ibrahim Osman to conduct an internal Audit of his restaurant due to alleged financial discrepancies. He travelled to Nakuru to carry out the said Audit and he discover that Kshs 923,905 was lost. He averred that he faced an uphill task as some of the Bills were missing. He added that after the auditing the Claimant was called to explain the discrepancies but failed to speak only and requested to speak to the directors only. He states that he was later told by the directors that she confessed to stealing from the company.
20. Upon cross examination by Ouma Advocate, RW-1 testified that she is a professional auditor and a member of ISPAC. He avers that he came to know the Claimant as the Respondent's cashier/PA to the managing director. He stated that the audit report was prepared for the duration between February, 2014 and January, 2015. His role before carrying out the audit was to understand the system and investigate the person in charge of the system. After investigation he made his recommendation that some of the data was missing and others had been deleted giving the Claimant 3 days to provide the said information. Also that monies paid out to be recovered.
21. On re-examination the witness testified that he carried out the audit in presence of the Respondent's two directors, the Claimant, Claimant's father and brother.
22. The second witness was Ibrahim Issack who appeared as RW-2 and adopted his witness statement dated 25.4.2017 which in summary stated that he works in the dispatch unit and his task was to receive orders from customers, and printout readings to the chefs and finally hand over the print out to the cashier who was the Claimant. He stated that the Claimant, who was the director's personal assistant used to supervise their daily operations of the Respondent. He also stated that the Claimant would at times burn the bills and print out claiming that they were not of any use and they were not to question her because she was their senior.
23. Upon cross examination by Ouma Advocate, RW-2 testified that he worked with the Claimant and the Claimant was the Assistant Director and the cashier of the Respondent. He affirmed that the Claimant used to burn bills and printout however that he never reported the issue to the management. He then affirmed that he did not have any evidence of his averments.
24. The Respondent' director one, Mohamed Ibrahim Osman testified as RW-3. He also adopted his witness statement dated 25.4.2017 which in summary stated that he is the one that employed the Claimant. He avers that he was approached by the Claimant's father who sought for employment for her daughter (the Claimant) and out of good faith he offered her to be his co-director's Personal Assistant. Sometimes on 10th November, 2014 while at the restaurant for the routine morning briefing he was informed by the manager that the sales and the bills were not tallying. In order to ascertain the issue, he directed the manager to observe the issue for the next 3 days till 13th November, 2014 and



indeed it was discovered that the restaurant had lost Kshs. 37,000 within those days. The password to the system was secretly changed and the sales and bills tallied confirming that the theft was done through the system. A meeting was convened for the co-directors, system installer and auditor who carried out a proper audit and it became apparent that the Claimant had been stealing money from the Respondent. The parties tried resolving the matter and the Claimant even confessed of her actions and asked for forgiveness in a closed door meeting between the Claimant and the directors however when in presence of the other parties and his family the Claimant reneged on the confession and the matter was escalated to the police.

25. The witness testified further that he used to pay the Claimant Kshs 15,000 and the Claimant used to work from 8am to 2pm.
26. Upon cross examination by Ouma Advocate, RW3 testified that the Claimant was employed at a salary of Kshs 12,000 which was increased to Kshs 15,000. The witness testified that the Claimant was an Assistant Director who was tasked with daily accounts and sales and not the cashier. He stated that the cashier was Fatma. He also stated that the Claimant was found liable of the discrepancies in sales and bills and criminal charges were preferred against her which she was acquitted of. He maintained that they never terminated the Claimant's services.

Claimant's Submissions.

27. The Claimant submitted on three issues; whether the Claimant's termination was unlawful; whether the Claimant is entitled to the reliefs sought and who should bear costs.
28. On the first issue, it was submitted that the Claimant was arrested while at work place and upon being released on bond terms, the Respondent directed him not to step on the Respondent premises as such dismissing the Claimant without notice or disciplinary process. It was argued that the termination was against the express provisions of section 45(4) of the *Employment Act*. To support her case the Claimant relied on the case of Janet Nyandiko V Kenya Commercial Bank Limited [2017] eKLR where the Court held that;-

“The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee”

29. It was submitted that the right to be heard is an important one that cannot be alienated and relied on the case of *Absolom Opini Mkenye V James Obegi*[2018] eKLR.
30. Similarly, that the Claimant was never given an opportunity to explain herself as such the termination was based on unjustified reason and contrary to laid down procedure, therefore unfair in both procedure and substance and urged this Court to allow the claim as prayed.



Respondent's Submissions

31. The Respondent submitted that the Claimant deserted employment and was not terminated as alleged. It was argued that having terminated employment the Respondent was tasked with demonstrating efforts taken in tracing the employee and notice issue to the employee of the termination of contract based upon the desertion. Accordingly, he argued that the Respondent's director followed up on the Claimant's whereabouts.
32. It was submitted that the Respondent had attempted to resolved the issue however the Claimant was adamant in talking making it impossible to continue with the deliberations.
33. The Respondent maintained that the Claimant absconded duty out of shame of facing criminal charges and was never terminated as alleged therefore that the Claimant's separation from the Respondent is justified and was not unlawful as pleaded.
34. On the prayers sought it was submitted with regard to underpayment, overtime, annual leave and Holiday that the same are continuing injuries that ought to have been brought before the Court within one year, therefore that these claims are time barred. In support of its case the Respondent relied on the case of *James Kyama V Muthaiga Golf Club* [2022] eKLR where the Court held that;

"As to whether the claim of overtime pay is time barred, it agreed that the Claimant resigned from employment on the 2nd June, 2015 and he filed this Suit on the 17th may. 2016.
31. Limitation of action with regard to employment causes has been aptly captured under section 90 of the *Employment Act* which provides as follows;

"90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

32. The claim for overtime in my opinion is a continuous wrong contemplated under Section 90 of the *Employment Act* which claim must be made within 12 months of cessation thereof."

35. It was further submitted that the Claimant was not skilled as cashier and therefore was employed as general labour to provided personal assistant services to the managing director of the Respondent as such her pay ought to be that of unskilled labour which was Kshs 6,743 as at 2010 and it was infact a favour that she was paid Kshs 15,000 by the Respondent.

36. On the counterclaim, the Respondent submitted that the audit report and the testimonies of Respondent witnesses clearly demonstrated that the Claimant had misappropriated funds belonging to the Respondent which the Claimant ought to be compelled to pay.

37. In conclusion, the Respondent urged this Court to disallow the claim and allow its counterclaim with costs.

38. I have examined the evidence and submissions of the parties herein. From the evidence adduced by the Claimant, it is clear that she had an employment relationship with the Respondents.

39. She was however never issued with any appointment letter, and no payslip was generated to indicate what she was earning.



40. The Respondents have also denied dismissing the Claimant but aver that she absconded duty. They aver that they could not subject her to a disciplinary process because she had absconded duty.
41. The issue of whether the Claimant absconded duty or not has not been settled in this case.
42. In *James Okeyo V Maskant Flower Ltd* (2015) Eklr, in the authority cited by the Respondents herein, the court observed that;

“.....The employee who deserts employment does not dismiss himself so to speak. The decision to formerly end the employment relationship should come from the innocent party.”

43. It is indeed true that where an employer alleges determination on account of abscondment the employer has a duty to seek to terminate the employment relationship after issuing the employee with a NTSC to explain why she/he cannot be terminated for absenteeism.
44. In the same vain, the employer must follow with a proper disciplinary process on the same reason in order to close up the dismissal formerly. The employer must show his attempt to seek out the employee on several occasions before he terminates this relationship.
45. In the case of the Claimant herein, despite the Respondent insisting that the Claimant absconded duty, there is no indication that the Respondents tried to reach her to explain why she could not be dismissed for absconding duty.
46. In the circumstances of this case, I find that the Respondents have not established that the Claimant absconded duty in the wake of the claim by the Claimant that she was dismissed verbally.
47. In the same vain, there is no evidence that the Claimant was subjected to any disciplinary process before termination as envisaged under Section 41 of the *Employment Act* 2007 which states as follows;-

“41. Notification and hearing before termination on grounds of misconduct

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, an 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 grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

48. Having found that the Respondents have not established the validity of reasons leading to dismissal of the Claimant and in absence of subjecting her to a fair disciplinary process, I find the dismissal of the Claimant unfair and unjustified as provided for under Section 45(2) of the *Employment Act* 2007 which states as follows;-

“ 45.

(1)

.....



- (2) A termination of employment 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 employee's 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”.

49. As for the remedies sought the Claimant indicated that she worked long hours and was underpaid. The Respondent witness agreed that she worked for them and earned 15,000/= per month and worked from 8.00am to 2.00pm.
50. The Claimant on her part indicated that she worked from 7.00am to 7.00pm working 4 hours overtime daily.
51. There is no payslip provided to the Claimant and no master roll produced before court to show the working hours.
52. The Claimant worked as a cashier and she earned 9,000/= per month. As at 2010 and as per LN No.97., she was then underpaid 5,319 per month. The same is also true for all the other years as per the LR No.64 of 2011, LN No. 70 of 2012 and LN 197 of 2013. Her claim for underpayment is thus justified and I award her on this limb kshs.296,698.60/= for underpayment.
53. As for overtime, none of the parties produced any master roll to indicate the working hours. The Claimant averred she worked 4 hours overtime daily but the Respondent denied this. The Claimant didn't produce the master roll to show the working hours and neither is there any evidence that she requested the Respondents to produce the same and they failed to do. It is therefore my finding that the claim for overtime pay is not proved and is therefore disregarded.
54. The Claimant is also awarded 1 year leave being equivalent to 1 month's salary as at 2014 = 20,770/=.
55. I also award Claimant holiday pay for 2012, 2013 & 2014 = 19,650/=.
56. I also award Claimant 1 months salary in lieu of notice = 20,770/=
57. And 10 months salary as compensation for unlawful termination equivalent to 10 x 20,770 = 207,700/=
- Total Awarded = 565,856.60
- Less statutory deductions
58. As concerns the counter claim, the Respondents aver that the Claimant stole money from them amounting to 923,805/=.
59. The Respondents aver that the Claimant was responsible for this loss.
60. The Respondents chose to rely on an audit report which was prepared by one Ashiruma. The report is not dated nor signed.



61. The report covers the period between February 2014 to January 2015 even beyond the period when Claimant avers she was dismissed in November 2014. It would be dangerous to rely on such a report.
62. I find the counter claim not proved and I dismiss it accordingly.
63. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Njogu for Respondent – present

Ouma for Claimant – present

Court Assistant - Fred

