



**Mwanga v Metal Cans And Closures (K) Limited (Cause 2278 of 2016)
[2022] KEELRC 1108 (KLR) (20 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1108 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2278 OF 2016
NZIOKI WA MAKAU, J
JUNE 20, 2022**

BETWEEN

MELTUS MAGENI MWANGA CLAIMANT

AND

METAL CANS AND CLOSURES (K) LIMITED RESPONDENT

JUDGMENT

1. The Claimant vide his memorandum of claim filed on 8th November 2016 avers that he was employed by the Respondent as a Store Keeper with a starting salary of Kshs. 11,000/- a month from April 2009. He avers that by the time of his termination the sum had risen to Kshs. 32,500/-. He avers that he worked tirelessly and diligently for the Respondent as an Assistant Stores Manager. He thus sought payment of salary for days worked in April but not paid – Kshs. 23,750/-, overtime worked – Kshs. 341,250/-, accrued annual leave for 7 years – Kshs. 227,500/-, two month salary in lieu of notice – Kshs. 65,000/-, 7 year compensation for wrongful dismissal/unfair termination – Kshs. 157,500/- all making a grand total of Kshs. 815,000/-. The Claimant in addition sought compensation by way of lost income from the date of filing suit till the date of judgment. He also claimed costs of the suit as well as interest at court rates on the sum claimed. He also sought a certificate of service.
2. The Respondent filed a defence in which it averred that the Claimant was not illegally terminated from his employment and that instead, the Claimant absconded from work without giving any notice to the Respondent. The Respondent denied that it had failed to pay the Claimant his March and April salary. The Respondent denies that the Claimant was entitled to 26 days annual leave but that he was entitled to 21 days annual leave with full pay and that the Claimant took annual leave and was paid in lieu of leave days not taken. The Respondent denies that the Claimant was dismissed and that instead he absconded from work without giving any notice. The Respondent avers that the Claimant was issued with several warning letters from the Respondent and that his suit is fatal ab initio and irretrievably misconceived, bad in law, incompetent and defective fit for striking out and/or expunging.



The Respondent averred that the Claimant's suit was anchored on misinformation and it thus urged the dismissal of the suit with costs.

3. The Claimant testified as did the Respondent's witness Joachim Kudoyi. Nothing turned on the oral testimony as parties merely rehashed their pleadings. The parties thereafter filed submissions.
4. The Claimant submitted that the issues call for determination are:
 1. Whether or not the Claimant worked as a storekeeper earning a starting salary of Kshs. 11,000/-?
 2. Whether there was a valid contract between the Claimant and the Respondent?
 3. Whether or not the Claimant's salary was increased to Kshs. 26,250/- then to Kshs. 32,500/- due to the diligent services offered to the Respondent?
 4. Whether the Claimant is entitled to Payments for damages for unlawful termination in terms of overtime, leave and 2 months in lieu of notice?
 5. Whether or not the Claimant is entitled for compensation to maximum of 12 months per year worked?
5. The Claimant submitted as to whether or not the Claimant worked as a storekeeper earning a starting salary of Kshs. 11,000/-, he submitted that it is not dispute that the Claimant used to work for the Respondent, starting April 2009 until his services were unlawfully terminated on 18th April 2016. As to whether or not the Claimant's salary was increased to Kshs. 26,250/- then to Kshs. 32,500/- due to the diligent services offered to the Respondent, the Claimant submits that it is also not in dispute that when the Claimant was first employed he used to earn Kshs. 11,000/- per month, this was enhanced to Kshs. 26,250/- per month then to Kshs. 32,500/- per month. As to whether the termination of the employment of the Claimant herein was unfair, unlawful and illegal hence null and void, the Claimant submits the answer is yes. The Claimant submits that he tirelessly performed on his part of the employment contract between 2009 and 2016 without any disciplinary action being preferred against him until the time of his wrongful termination in 2016 and that on or about March 2015, the Director Nikhil doubling up in marketing through the Production Manager Rutvik wrote malicious warning letters and ultimately sacked the Claimant. The Claimant submits that moreover as to whether the summary dismissal was lawful or whether it amounted to unfair termination of services, the burden of justifying the ground of summary dismissal lies upon an employer. He submits as to whether he is entitled to payments for damages for unlawful termination in terms of overtime, leave and 2 months in lieu of notice, and as to whether or not the Claimant is entitled for compensation to maximum of 12 months per year worked, he submits that he is and cites various judicial authorities. He cites the case of *Jane Samba Mukala v Oltukai Lodge Limited* [2010] LLR 225 where the Court observed that—
 - a. “Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
 - b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.



- c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”
6. The Claimant also cited the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the court observed thus;
- “... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
7. The Claimant cited the cases of *Alphonse Machanga Mwachanya v Operation 680 Limited* [2013] eKLR and *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR. He submitted that the dismissal was unfair and unlawful for reason of
- i. Failing to give notice of termination of employment as provided under the contract.
 - ii. Failing to pay the Claimant his contractual entitlements.
 - iii. Terminating the contract without justifiable reasons.
- He thus urged the grant of the prayers in his claim.
8. The Respondent on its part submits that the Claimant was employed by the Respondent as a Stores Assistant Manager from November 2009 to 18th April 2016 when he absconded duty. It avers that during his term as an employee of the Respondent, the Claimant had numerous disciplinary issues forcing the Respondent to issue him with various warning letters. The Respondent avers that the Claimant oblivious of his shortcomings as stipulated above proceeded to institute the suit herein against the Respondent. It avers that in sum, the Claimant alleges that he was unfairly, unlawfully and illegally terminated from employment by the Respondent and that the issues for determination are whether the employment contract was unfairly and unlawfully terminated and whether the Claimant is entitled to compensation as claimed. The Respondent cited Section 43 of the *Employment Act* and submitted that in a claim arising out of termination of a contract, the employer is required to prove the reason(s) for the termination, and where the employer fails to do so, the termination is deemed to be unfair within the meaning of Section 45 of the *Employment Act*. The Respondent submits that the reason(s) for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. It submits that Section 45 of the *Employment Act* enunciates that a termination of employment by an employer is unfair if the employer fails to prove:
- a. That the reason for termination is valid;
 - b. That the reason for the termination is a fair reason –
 - i. Related to the employee's conduct, capacity or compatibility;



- ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.
9. The Respondent submits that a termination of employment shall be unfair where it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity while terminating the employment of the employee. It submits that further the Employment Act goes to state under Section 47(5) that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that a termination of employment is unfair or dismissal is wrongful rests on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer. The Respondent cites the case of Protus Wanjala Mutike v Anglo African Properties t/a Jambo Mutara Lodge Laikipia [2021] eKLR where the court while citing the provisions of the Employment Act Section 47(5) elucidated that;

“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 to which the Claim is lost.”

10. The Respondent submits that in the present case the Respondent was not availed an avenue to carry out its due internal processes as the Claimant absconded his duties and failed to communicate to the Respondent the reasons as to why he decided to do so. It submits that in the circumstances therefore, the Respondent can only rely on the records of the conduct of the Claimant during his term which clearly show a history of disciplinary issues leading to the issuance of various warning letters which have been produced by the Respondent in its bundle of documents. The Respondent submits that the Claimant has not demonstrated that there was a termination let alone whether or not the said alleged termination was unfair. From the foregoing, the Respondent submits that there was no termination, this is a case of absconding of duty and further that in the circumstances the Respondent had sufficient grounds to summarily dismiss the Claimant would it have been availed the chance to do so. The Respondent submits that at all material times it never denied the Claimant any of the leave days he was entitled to as per his contract and further paid the Claimant for all leave days not taken as evidenced by the salary slips adduced before this Honourable court. The Respondent submits the Claimant has not provided any proof to the contrary. On the claim for overtime, it submits that the Claimant never worked past the working hours as per his employment contract which is also clearly evidenced in the Attendance List which has been produced before the court. The Respondent submits that the Claimant has not brought any evidence to the contrary and is therefore not entitled to any payment for overtime. On the aspect of a months' salary in lieu of notice, the Respondent submits that the employment contract between the Respondent and the Claimant states that either party may terminate the agreement by giving one month notice or pay one month salary in lieu of notice. In this case, the Respondent has at no particular point in time terminated the aforementioned contract and that in any event, the Respondent would have been well within his rights to summarily dismiss the Claimant and that therefore, the Claimant is not entitled to 2 months' salary in lieu of notice. On the claim for 7 years compensation for wrongful dismissal/unfair termination, the Respondent submits that it has produced evidence of gross misconduct on the part of the Claimant and that further it was robbed of the opportunity to follow due procedure in handling the misconduct of the Claimant when he absconded his duty. The Respondent submits that the Claimant is therefore not entitled to any compensation for the alleged wrongful dismissal/unfair termination as no termination/dismissal took place. It is the Respondent's humble submission that the Claimant has not met the burden of proof in proving his allegations of unfair/wrongful termination and it would therefore be unjust to punish the Respondent for the Claimants actions. From the foregoing, the Respondent prays that the court takes



note of the Claimants history of gross misconduct and further the lack of evidence on the allegations of unfair termination along with our foregoing submissions in dismissing the Claimant's prayers with costs.

11. The Claimant was not subjected to the disciplinary process as required under Section 41. This was as a result of the Claimant allegedly absconding from work. Like in all cases of misconduct, desertion must be proved through evidence showing efforts to reach the employee. It is not enough for an employer to simply state that an employee has deserted duty. The Respondent never provided any evidence that the Claimant was ever contacted to lend credence to the assertion that there was desertion. The Claimant therefore is found to have been unfairly dismissed. In his claim before court, the Claimant sought sums that are not even payable under the Employment Act such as compensation for 7 years and overtime for 7 years. If indeed he had been entitled to overtime how come none was ever claimed before the suit was filed? In the contract he exhibited, the hours of work were 7.30am to 5.00pm which would not entitle him to any overtime as there was time for a lunch break in between. The Claimant proved he has not been issued with a certificate of service. As such he is entitled to a certificate of service which the Respondent must avail within 7 days of the judgment. The Claimant is also entitled to costs on the suit.
12. In the final analysis I enter judgment for the Claimant for:-
 - i. One month's salary in lieu of notice – Kshs. 32,500/-
 - ii. 2 month's salary as compensation in terms of Section 49 of the Employment Act – Kshs. 65,000/-
 - iii. Costs of the suit.
 - iv. Interest on the sums in (i) and (ii) above at court rates from date of judgment till payment in full.
 - v. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2022

Nzioki wa Makau

JUDGE

