



**Makori v Nine One One Group Limited (Cause 80 of 2018)
[2022] KEELRC 115 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 80 OF 2018
HS WASILWA, J
JUNE 16, 2022**

BETWEEN

DENNIS OKONG'O MAKORI CLAIMANT

AND

NINE ONE ONE GROUP LIMITED RESPONDENT

JUDGMENT

1. Denis Okong'o Makori filed a Memorandum of Claim dated 19th March, 2018 suing Nine One One Group Limited for unfair termination. He avers that he was employed by the Respondent in July, 2012 as a night Security Guard at a salary of Kshs 9,250. He avers that he reported to work everyday at 5:30 pm and clocked out at 6am.
2. It is stated that sometimes in December, 2017 the Claimant was deployed to Etare Dam in Kuresoi within Nakuru County, which place was so cold that the Claimant contracted Pneumonia and allergic cough triggered by the said cold causing him to be taken to St Joseph Nursing and Maternity Hospital in Molo Town by his supervisor for treatment. Upon discharge the doctor recommended the Claimant to be transferred to another place with warm weather and he was given 7 days' sick off that commenced on the 20th to 27th December, 2017. A further check-up was carried out on the 28th December, 2017 at Nakuru Maternity and Nursing home where the Claimant was given 2 more days to rest till 30th December, 2017
3. On 1st January, 2018 the Claimant was called by his supervisor to report to Free Area Estate which the Claimant obliged and reported to duty however on the evening of 2nd January, 2018 the Claimant's services were cut short and directed not to report to work again. The Claimant avers that he followed up on his employment status and on 26th February, 2018 he accepted that he had been terminated.
4. He contends that the Respondent during his employment never provided him with housing or paid his House allowance. That he was underpaid and that he was not paid during public holidays and



- overtime when he worked for the Respondent. He also stated that he never went for leave during his employment neither was he compensated for the same.
5. He contends that his termination was unfair because there was no reason given for the termination, he was not subjected to any disciplinary process neither was he given notice of termination. He added that the termination was in breach of provisions of section 41 and 43 of the Employment Act.
 6. He therefore prays for the following reliefs; -
 - a) A declaration that the Claimant's dismissal is wrongful and unfair.
 - b) A declaration that the Claimant's rights to fair labour practices, remuneration, reasonable working conditions, economic and social rights guaranteed and protected by Articles 41 and 43 of the condition have been violated by the Respondent.
 - c) Payment of Kshs. 1,500,826,05 with interest made up as follows; -
 - i. Kshs 17,040.70 being pay for January, 2018.
 - ii. Kshs 17,040.70 being one-month salary in lieu of Notice.
 - iii. Kshs 26,743.70 being salary underpayments from 2012 to the date of dismissal.
 - iv. Kshs. 111,755.60 being unpaid house allowance.
 - v. Kshs 70,318. Being pay for public holidays worked.
 - vi. Kshs. 51,111 being gratuity under regulation 17(1) of the Regulations of wages (Protection security services) Order 1998.
 - vii. Kshs. 981,037.20 being pay for overtime worked.
 - viii. Kshs. 4250 being unpaid leave traveling allowance.
 - ix. Kshs. 204,488.40 being compensation for the wrongful termination of the contract of employment in terms of section 49(1)(c) of the Employment Act.
 - d) Compensation in terms of Article 23(3)(e) of the Constitution.
 - e) A certificate of Service 9Under section 51of he Employment Actcap 11 of 2007.
 - f) Costs of this suit with interest until payment in full.
 - g) Any other or further relief that this Honourable Court may deem fit to grant.
 7. The Respondent entered appearance on 17th May, 2018 and filed a response to claim on the 27th September, 2019 averring that the Claimant was engaged by the Respondent as security guard from 1st August, 2012 and his salary increased till a consolidated sum of Kshs. 12,240. It is stated that the Claimant was indeed transferred to Free Area Estate which he worked on 1st and 2nd January, 2018 only and the Respondent re-deployed him back to Etare Dam in Kuresoi and instead of complying he reported to the Respondent's office in Nakuru and caused disturbances and later left without reporting to the station he was allocated work. The Respondent contends that the Claimant absconded duty when he failed to report to Etare Dam where he had been re-deployed.
 8. The Respondent avers that upon the said desertion it sent the Claimant his letter of summary termination dated 10th January, 2018 vide his registered Post, which letter informed the Claimant of his right to appeal which he has failed to utilize. It was also stated that the Claimant was not paid his



terminal dues as he is yet to clear with the Respondent. He added that the Claimant is only entitled to 12 days worked, 8 pending leave days and uniform refund which payment is subject to statutory deductions.

9. It is contended that the Claimant's rights were never violated and urged this Court to dismiss the claim.

Evidence.

10. The Claimant testified as CW-1 and adopted his witness statement dated 19.3.2018 which basically reiterated the claim and produced document number 1, 2, 3 and 6 as his exhibits.
11. Upon cross examination by Ligam Advocate, the witness testified that he was being paid a consolidated salary as per the Employment Contract. He stated that he worked either as a night guard or a day guard and at the end of his employment he was working as a day guard.
12. The Respondent called its Human Resource officer, Agoyi Achoka, as its RW-1 who adopted his statement of 19.9.2019 and produced documents as Exhibit 1-4 respectively.
13. Upon cross examination by the Omae Advocate, the witness testified that the Claimant fell sick at work and was taken to hospital however that based on the sick off he became well and was to be deployed back to his initial place of work. He avers that the Claimant after the sick off absconded duty and his employment came to an end. The witness denied ever receiving the letter dated 5.1.2018 by the Claimant asking about his employment relationship after the re-deployment.

Claimants Submissions.

14. The Claimant submitted on two issues;- whether the Claimant's dismissal was wrongful and whether the Claimant is entitled to the reliefs sought.
15. On the first issue it was submitted that the Respondent admitted to terminating the services of the Claimant summarily on the basis that the Claimant had absconded duty and even send a letter of summary termination vide the Claimant's registered postal address. It was argued that the Claimant was terminated without notice or disciplinary process envisaged under section 41 and 43 of the Employment Act as such that the employment failed in both substantive and procedural fairness. In support of this the Claimant relied on the case of *Tom wekesa Musungu V Nation Media Group Limited* [2017] eKLR and the case of *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.
16. It is submitted that the reason given by the Respondent of desertion of duty from 31st January, 2018 was not justified because the Respondent failed to demonstrate any steps taken to get in touch with the employee and in any case that the Respondent was aware of the Claimant's whereabouts and even admitted during hearing that the Claimant was to report back to work after the sick off. He argued further that the claim of desertion was further watered down by the Respondent when they admitted at paragraph 12 of Memorandum of claim that the Claimant worked in free area for 2 days and upon deployment back to Etare he absconded duty.
17. The Claimant also submitted that the second reason for alleged termination was for disobedience of lawful and proper commands raising question as to the allegation by the Respondent of desertion.
18. On the reliefs sought, it was submitted that the Claimant has proved his case to the required standard and therefore deserved to be awarded the reliefs sought as prayed in the claim.



Respondent's Submissions.

19. The Respondent submitted on the following issues; Whether this Court has jurisdiction to determine the Claim before exhaustion of internal dispute resolution mechanism, Whether the Claimant can adduce documents in Court not being the maker of the documents, Whether the Claimant is entitled to the reliefs sought and Whether the Claimant's employment contract was unlawfully terminated.

20. On the first issue it was submitted that the Claimant did not exhaust the internal dispute resolutions before lodging the instant suit. To support its case the Respondent relied on the Court of Appeal decision in *Geoffrey Mutbinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others* [2015] eKLR stated that:-

"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

21. Accordingly, it was submitted that the Respondent never received the letter dated 5th May, 2018 by the Claimant inquiring on the status of his employment as such this instant suit offends the principle of exhaustion of internal dispute resolution mechanisms and Article 159 of the Constitution and should be dismissed accordingly.

22. The Respondent submitted and objected to the production of the documents prepared by one Jacintah Mbugua who is/was a clinical officer at the St. Joseph's Nursing & Maternity Home where the Claimant treated. The said documents include: the letter, medical officers report and medical certificate dated 31st December 2017. It was argued that the Claimant not being the marker of the said documents cannot adduce the same in evidence. To support their argument, they cited the case of *Joao Francis Quadros v SDV Transami Kenya Ltd* [2005] eKLR where Maraga J (as he then was) held:

"Section 35(1) of the Evidence Act Cap 80 of the Laws of Kenya is quite clear. Documents have to be produced by the maker except where the maker is:- "...dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable." The Plaintiff has not come under any of these exceptions. He has not given any reason why the maker of those documents cannot be called. In the circumstances I find no basis for allowing the plaintiff to produce them. The documents shall be produced by the maker. I therefore sustain the objection with costs to the defendant."

23. Accordingly, it was submitted that Claimant did not address the Court of any attempts or difficulties in securing attendance of the maker of the documents in Court and has neither justified why he should be exempted and allowed to adduce the said evidence as required under Section 35(1) of the *Evidence Act*. Therefore, the said evidence adduced by the Claimant should be disregarded.

24. On the reliefs sought, the Respondent submitted that the Claimant worked for only 2 days in the month of January, 2018 and absconded duty on the third day. It was also submitted that the Claimant pay at the time of separation from the Respondent employ was Kshs 14,900 as per the Claimant



pay slip for December, 2017 and not 17040.70 as alleged. He added that the Kshs 14,900 was an all-inclusive pay which factored in the house allowance and was in line with the Legal Notices for the Regulation of Wages (General) (Amendment) Orders duplicated in their submissions. In this the cited the decision by Makau J. in *Stephen O. Edewa v Lavington Security Limited* [2019] eKLR where the Court addressed a similar issue and while addressing the provisions of Section 31 of the Employment Act held as follows:

“...The foregoing is corroborated by the payslip produced as an exhibit by the Claimant which showed that the sum paid as basic pay was also described as gross pay. Consequently, and in view of the provisions of section 31 of the Act, I find that the Claimant’s salary was consolidated pay that included his house allowance and as such his claim for that allowance fails.”

25. On gratuity pay sought, the Respondent submitted that the same is not payable as it was not provided for under the contract and the same is not statutory to warrant payment as of right. In this they relied on the Court of Appeal decision in *Bamburi Cement Limited v William Kilonzi* [2016] eKLR where it was held that:

“Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer.”

26. Also in *Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi* [2019] eKLR while upholding its decision in *Bamburi Cement Limited v William Kilonzi* (Supra) held that:

“We are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the Employment Act of 2007 does not make it mandatory for employers to pay gratuity to employees.”

27. On the compensation for unfair termination, it was submitted that the Claimant was not terminated as pleaded rather that he absconded duty and therefore not due for payment of damages for the alleged unfair termination.
28. It was submitted that the claim for damages under Article 23(3)(e) of the Constitution is not applicable as the Claimant has already claimed for “Kshs. 204,488.40/- allegedly being compensation for wrongful termination of the contract of employment in terms of Section 49(1)(c) of the Employment Act 2007, therefore that both of these prayers seek the same remedy and should both prayers be allowed as prayed, it would amount to duplicitous and punitive damages against the Respondent. It was further submitted that that Section 49(1)(c) of the Employment Act under which the Claimant claims for compensation for alleged wrongful termination of the contract of employment is actually meant to operationalize and actualize Article 23(3)(e) of the Constitution hence the remedy for compensation so provided is one and the same.
29. On the issuance of certificate of service, the Respondent submitted that it shall issue the same upon clearance by the Claimant.
30. The Respondent in conclusion maintained that the Claimant absconded duty and was not terminated as alleged therefor is not entitled to payment of the reliefs sought and that this Court ought to dismiss the claim herein with costs.



31. I have examined the evidence and submissions of the parties herein.
32. The Claimant contends that he was unfairly dismissed by the Respondents without due process nor valid reasons.
33. The Respondents on their part aver that the dismissal was fair actuated by the Claimant's action of absconding duty.
34. The Respondents admitted that they were aware that the Claimant fell ill while on duty and was indeed treated and thereafter only worked at Free Area on 1st & 2nd January 2018 and was deployed back to Etare Dam in Kuresoi.
35. The Respondents did not exhibit any letter or evidence indicating that the Claimant had been deployed back to Etare Dam after the 2nd January, 2018.
36. The Respondents aver that they send him a letter after he deserted duty and exhibited a letter dated 9th January, 2018 addressed to the Claimant at the Respondents own address.
37. This infact is an indication that the Respondents failed to notify the Claimant of the fact that he had deserted duty.
38. They aver that they sent him a letter at his last known address which is not factually correct because the Respondents used their own address and even the dismissal letter was sent at its own address.
39. Given that the Claimant was dismissed without subjecting him to any disciplinary hearing and without establishing there were valid reasons to warrant dismissal, I find the Claimant's dismissal unfair and unjustified.
40. In terms of remedies, I find that the Claimant's contract of employment indicated that he was to be paid a consolidated salary. His claim for house allowance is therefore not payable.
41. The Claimant is however entitled to the following remedies;
 1. 1 Month's salary in lieu of notice = 14,815/=
 2. Claim for underpayment in salary as pleaded = 26,743.70/=
 3. Public holidays not paid for 2014 to 2017 the rest of the claim being time barred = 53,376/=
 4. 10 Months salary as compensation for unfair termination
 $10 \times 14,815/= = 148,150/=$
TOTAL awarded = 243,084.70
Less statutory deductions
 5. The Respondent 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 16TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ratemo for Omae for Claimant – present



Ligami for Respondent – present

Court Assistant - present

