



**Kitela v Nesco Services Limited (Cause 1649 of 2017)
[2022] KEELRC 110 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1649 OF 2017
SC RUTTO, J
JUNE 10, 2022**

BETWEEN

JIMMY MBITHI KITELA CLAIMANT

AND

NESCO SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent and posted to work at the home of its director. That his main roles included taking care of pets, maintaining the compounds, doing laundry, gate keeping and security. That this was in consideration of a monthly salary of Kshs 9,780.95. All seemed to be well until 7th November, 2014 when the claimant avers that he fell down at the home of the respondent's director hence sustained serious injuries on his right leg.
2. That upon medical evaluation, he was advised by the doctor to undertake lighter duties. That upon communicating the doctor's recommendation to the respondent's director, he was ordered to leave the compound, an act he interpreted to mean dismissal from employment. It is against this background that he now seeks a declaration that his dismissal was unprocedural, unfair and unlawful; salary for the month of December, 2014 and January, 2015; notice pay; compensatory damages; punitive as well as aggravated damages.
3. The claim was opposed through the respondent's response and counterclaim. The respondent denied being aware of the claimant's injuries. It averred that the claimant absconded duty from its director's home in November, 2014. That this abscondment was without notice hence the employment relationship was severed at the instance of the claimant. That indeed, the claimant deserted duty and went to work for the sister of the respondent's director.



4. To this end, the respondent counter claimed against the claimant the sum of Kshs 6,395.24 being advance leave days he took in 2014 as well as Kshs 9,780.95 being one month's salary in lieu of notice. The respondent asked the Court to dismiss the claim with costs and allow its counter claim.
5. The matter proceeded for part hearing on 17th January, 2022 and later on 26th January, 2022 when the defence closed its case. Each side presented oral evidence.

Claimant's case

6. The claimant adopted his witness statement and bundle of documents to constitute part of his evidence in chief. He also produced the said documents as his exhibits before Court.
7. It was his testimony that on 7th November, 2014, while in the employment of the respondent, he sustained injuries in the course of duty. That he reported the incident to the respondent's director, whose house he was stationed at, at the time. That the respondent's director failed and/or refused to take him to hospital to get treatment for his injuries. That he thus sought medical attention at his own cost. That the doctor advised him to restrict himself to lighter duties so as to allow him sufficient time to recover fully.
8. That it was upon informing the respondent's director of the doctor's recommendation, that he was ordered to leave his compound. That he interpreted this action by the respondent's director as amounting to dismissal from employment. He further stated that he was paid full salary for the month November, 2014, while in December, 2014, he was paid half salary. He termed his termination as unfair, unlawful and wrongful. He further pleaded that he was not given an opportunity to be heard prior to his termination. That following his termination, he was employed at the home of the sister to the respondent's director in May, 2015. He asked the Court to allow his claim as prayed.

Respondent's case

9. The respondent presented oral evidence through Mr. Harun Osoro Nyambuki and Ms. Rachel Momanyi Bitanga, who testified as RW1 and RW2 respectively. RW1 adopted his witness statement and documents filed on behalf of the respondent, to constitute part of his evidence in chief. This was with the exception of the Affidavit sworn by RW2.
10. RW1 identified himself as the director of the respondent. He told Court that initially, he employed the claimant at his home in Kisii, to primarily care for his mother and also to undertake domestic chores. That sometimes in 2014, his mother moved to Nairobi for medical consultation and since the claimant was primarily employed to take care of her, he accompanied her. That while in Nairobi, the claimant also doubled up as a security guard during the day.
11. It was his testimony that the claimant was a good employee and he never had issues with him. That the claimant absconded duty sometimes in November, 2014 without notice. That when he went to visit his sister, RW2's home towards the end of 2014, he found out that the claimant was working there and in fact, it was him who opened the gate for him. He denied the claimant's assertions that he was aware of his injuries and subsequent medication. In this regard, he stated that the respondent has a policy on medical issues hence the claimant would have been assisted if at all, he had reported the matter.
12. On her part, RW2, told Court that she is a sister to RW1. That she came to know the claimant while he was working for his brother. That the claimant went to her company to look for a job sometimes in November, 2014 and he was employed as a security guard at her residence. That the claimant did not inform her of the circumstances under which he had left RW1's employment.



13. She testified in cross examination that the relationship between the claimant and RW1 was fantastic. She further stated that she had no role in the claimant's employment, as the same was done through her company's office.

Submissions

14. It was submitted on behalf of the claimant that he was entitled to a fair disciplinary process as set out under section 41 of the *Employment Act*. In this regard, reliance was placed on the authorities of *Felistas Achecha Ikatwa vs Charles peter Otieno* (2018) eKLR, *Simon Mbiti Mbane vs Inter Security Limited* (2018) eKLR and *Joseph Nzioka vs Smart Coatings Limited* (2017) eKLR. It was further submitted that the respondent did not prove that it had valid reasons to terminate the claimant's employment.
15. On its part, the respondent submitted that the claimant had failed to discharge the burden of proving that there was unfair termination. The respondent placed reliance on the case of *Pauline Kathure Kiraithe vs Nation Media Group Limited* (202) (sic) eKLR.

Analysis and determination

16. From the pleadings on record, the evidentiary material before me and the opposing submissions, the questions calling for resolution by the Court can be distilled as follows: -
 - i. Whether the claimant absconded duty or was dismissed from employment?
 - ii. If terminated, was the claimant's termination fair and lawful?
 - iii. Is the counterclaim justified?
 - iv. Is the claimant entitled to the reliefs sought?

Abscondment of duty or dismissal?

17. The claimant has maintained that upon presenting the doctor's recommendation on lighter duties, he was ordered by RW1 to leave his compound. On the other hand, the respondent contends that the claimant absconded duty sometimes in November, 2014, only to surface at the residence of RW2.
18. The employment relationship that existed between the parties was not an ordinary one as they closely related given that the claimant was primarily employed to take care of RW1's mother. It is also not in dispute that at the material time, the claimant resided at RW1's compound and doubled up as a day guard. As such, despite the claimant being employed by the respondent, he was working directly under RW1. It therefore follows that he was answerable to him.
19. RW1 maintained that he was not aware that the claimant deserted duty until sometimes towards the end of 2014 or early, 2015 (as per his witness statement) when he visited RW2's home.
20. Despite having such a close connection and coupled with the fact that the claimant resided in the same compound, it is rather surprising that RW1 was not aware of his whereabouts all this while.
21. More surprising, is the fact that he never called him to enquire of his whereabouts. It is rather curious that being at RW1's residence 24/7 and serving as a groundsman and guard, the claimant's absence would escape his attention for close to two months. Besides, a security guard's absence or presence in one's residence is not possible to miss, given that this is the one person who will open and close the gate as one leaves and returns home.



22. Further, RW1 stated that at the time, he only had four (4) workers at his residence. That number of employees is not too big as to not notice that one of them is missing for two (2) months.
23. It was also incomprehensible for RW2 to state that she employed the claimant as a security guard at her own residence, without enquiring the circumstances under which he had left RW1's employment. It would be naive to believe that RW2 just opened her doors to the claimant and allowed him into her residence as a security guard without getting a word from RW1 as to what may have transpired between the two. After all, he knew him as the person who had taken care of their mother. How then could she just employ him without first enquiring from RW1 how the claimant had left? After all, he may have committed a wrongful act prior to leaving RW1's residence.
24. It was also RW2's own testimony that the claimant and RW1 had a fantastic relationship. It therefore beats logic how she could just proceed to employ the claimant without further reference to her brother, RW1.
25. Indeed, and as ordinarily expected, RW1 would have called the claimant to enquire of his whereabouts, noting that this was an employee who had a close connection to him and his family.
26. In the case of *Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme* [2015] eKLR the Court found as follows: -

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
27. I reiterate the finding in the above case and apply the same herein. The fact that RW1 admitted that he had not contacted the claimant upon noting his absence and notwithstanding the close relationship they had, casts doubt on his side of the story.
28. The set of circumstances presenting in this case, leads me to the inescapable conclusion that the claimant did not abscond duty but rather, was dismissed at the behest of RW1, whereafter he was employed by RW2.
29. Having found that the claimant was terminated, I now move to determine if the termination was fair and lawful?

Fair and lawful termination?

30. Going by the version presented by both sides, the claimant was not given notice or hearing prior to being exited from employment. If at all RW1's version of events is accurate, then he did not demonstrate, leave alone suggest that the claimant was asked to explain his absence from work. As a matter of fact, abscondment of duty is a ground for summary dismissal under section 44 (4) (a) of the *Employment Act*. Why did the respondent fail to take any action against the claimant for desertion of duty if at all?
31. In absence of proof, it is therefore evident that the claimant was not subjected to the process contemplated under section 41 of the *Employment Act*. It is instructive to note that the provisions of section 41 of the *employment Act*, are couched in a mandatory form. Essentially, the respondent was required to notify the claimant of the reasons it was considering terminating his employment



in a language he understands and in the presence of a fellow employee of his choice or a union representative, as the case maybe.

32. Subsequently, the respondent is at fault and is liable for not complying with the stipulated procedure in dismissing the claimant.

33. In light of the foregoing, the Court finds that the claimant's dismissal was unfair and unlawful.

Is the counterclaim justified?

34. Having found that the claimant was unlawfully dismissed, the counterclaim by the respondent in respect of the one month salary in lieu of notice is fails.

35. Further, the claim for 17 days leave taken in advance, flops as no evidence was presented to justify the same. This is noting that the respondent being the employer in this case, was responsible for maintaining employment records. As such, proving this claim was not an uphill task but it failed to do so.

Reliefs

Salary in lieu of notice

36. Having found that the claimant's dismissal was unfair and unlawful, he is awarded one month's salary in lieu of notice.

Compensatory damages

37. As I have found that the claimant was unfairly dismissed, and considering the length of the employment relationship, he is awarded seven (7) months gross salary in compensatory damages.

Salary for December 2014 and January, 2015

38. It was the claimant's own testimony that he was dismissed from the respondent's employment in November, 2014. He also admitted that he was paid full salary for the month of November, 2014 and half salary for the month of December, 2014. He is therefore not entitled to any salary as by his own admission he did not work for the respondent from November, 2014 onwards.

39. The claim for punitive and aggravated damages is declined as the same have not been substantiated.

Orders

40. In the final analysis, I enter judgment in favour of the claimant against the respondent as follows: -

a. An award of compensatory damages equivalent to seven (7) months' gross salary being Kshs 68,466.65.

b. An award of one (1) month's salary in lieu of notice, being the sum of Kshs 9,780.95.

c. The total award is Kshs 78,247.60

d. Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.

41. The counterclaim is dismissed.

42. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2022.



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STELLA RUTTO

JUDGE

Appearance:

For Claimant Ms. Gitau

For the Respondent Mr. Nyauchi

Court assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

