



**Komu v Odds & Ends Ltd (Cause 471 of 2016)
[2022] KEELRC 1488 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1488 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 471 OF 2016**

**SC RUTTO, J
JUNE 10, 2022**

BETWEEN

STEPHEN KATUNGU KOMU CLAIMANT

AND

ODDS & ENDS LTD RESPONDENT

JUDGMENT

1. The claimant initiated the suit herein vide a Memorandum of Claim dated 17th March, 2016 and through which he avers that he was terminated from his employment without any warning, notice and reason. He perceives his termination as unlawful, unjust, unreasonable and blatant breach of his contract of employment. It is for the foregoing reason that he claims against the respondent the sum of Kshs 172,500/= being salary and allowances for the remainder of his fixed term contract; unpaid salary for the month of August, 2014, one month’s salary in lieu of notice; and severance pay.
2. The claim was responded to by the respondent’s Reply to Memorandum of Claim dated 9th May, 2016. Through the response, the respondent denies terminating the claimant’s employment. The respondent further states that if indeed the claimant was terminated, the same was not without warning or notice. It is the respondent’s averment that the claimant proceeded on leave and failed to return to work. That as such, the claimant fundamentally breached his contractual obligations. Subsequently, the respondent asks the Court to dismiss the claim with costs.
3. The matter came up for hearing on 1st November, 2021 and the respondent was absent from court. The Court placed the file aside to allow the claimant’s advocate contact the respondent’s advocate by telephone. The claimant’s advocate reported to Court after 40 minutes that the respondent’s advocate was unreachable. The claimant through his Advocate produced an Affidavit of Service sworn by one Mr. Johnson Wambua Kisingu on 7th July, 2021, wherein he deponed that he had effected service of the day’s hearing notice upon the respondent. Annexed to the Affidavit of service was a copy of the hearing notice which bore the receiving stamp of the Advocate on record for the respondent.



4. The Court being satisfied with the return of service and being guided by Rule 22 of this Court's Rules, directed that the matter proceeds, the respondent's absence notwithstanding.
5. Upon close of the trial, the matter was mentioned on 26th January, 2022 for purposes of confirming filing of submissions by the claimant and taking a judgment date. The respondent's advocate, Mr. Mutitu, who was present, informed Court that he did not intend to reopen the case and only asked for leave to file his submissions.

Claimant's case

6. At the commencement of the trial, the claimant sought to rely on his witness statement and documents filed together with his claim. He asked the court to adopt the same as part of his evidence in chief. The documents were also produced as the claimant's exhibits before court.
7. As per the claimant's testimony, he was employed by the respondent as an assistant machine helper on a fixed term contract which was to run for two years. It was his testimony that on 4th September, 2014, he was terminated from employment without being given any reason or notice prior to the same. That further, he was not paid any salary for the month of August, 2014. That he had sustained injuries while at work on 28th March, 2013 hence had instructed his advocate to pursue compensation against the respondent. The claimant suggested that this might have been the reason behind his termination from employment. He asked the Court to allow his claim as prayed.

Submissions

8. The claimant submitted that his termination was unfair, unjustified and the procedure envisaged under sections 41 of the *Employment Act* was not complied with. Reliance was placed on several authorities including Nairobi Civil Appeal No. 291 of 2014, *Group Ltd v Jenny Luesby*, Kisumu ELRC No. 207 of 2016 and *Nyamboso Nyagaka v JRS Group Security Ltd*.
9. On its part, the respondent submitted that the claimant breached his contractual obligations by deserting duty for four (4) months. That as such he was not unfairly terminated as alleged. That the claimant vanished from employment upon being requested to present medical evidence to justify his absence from work. That due to the claimant's absence from work, he could not be afforded a chance to be heard. The respondent supported its submissions with the holding in the case of *Joseph Sohelo Mariko & another vs Pnadya Mukesh t/a Reish Restaurant Cause No. 1237 of 2013*.

Analysis and determination

10. From the pleadings on record as well as the evidence placed before court, the following issues fall for the court's determination;
 - a. Whether the claimant deserted duty or was terminated from employment?
 - b. If terminated, was the claimant's termination fair and lawful?
 - c. Is the claimant entitled to the reliefs sought?

Desertion or termination from employment?

11. The claimant has averred that he was chased away from work on 4th September, 2014 by the respondent's director, Mr. Nairesh. On the other hand, the respondent avers that the claimant deserted duty for four (4) months upon being asked to furnish a medical report to justify his continued absenteeism. The claimant has disagreed with the respondent's assertions that he deserted duty.



12. In view of the apparent credibility contest, the Court will need to draw an inference of where the truth lies, from the circumstances presented herein.
13. In support of its assertions that the claimant deserted work, the respondent filed in Court the work attendance register for the month of May, 2014. However, there were no work attendance records for the four (4) months the respondent alleges the claimant was absent from work.
14. Having averred in its defence that the claimant was absent from work for four (4) months, it was upon the respondent to prove the same. After all, it is the custodian of employee records. Any absence of an employee is a fact that can be easily proved. Indeed, it is quite odd that the respondent would produce the attendance records for the month of May, 2014 and leave out the four (4) months that are in contest.
15. Besides, it is notable that the attendance records produced, indicates against the claimant's name "S" from 17th -31st May, 2014. It does not indicate "A" as is indicated against other employees' names, who were presumably absent. The term "S" does not suggest that the claimant was absent without permission. As it was not contested by the respondent that the claimant had been unwell for some time, it is presumable that letter "S" stands for sick.
16. Needless to say, the respondent did not tender any proof of desertion by the claimant.
17. Above and beyond, the respondent did not indicate, leave alone suggest that upon noting that the claimant had deserted duty, it made attempts to establish his whereabouts. It is expected that where an employee deserts duty, an employer would take reasonable steps to ascertain the whereabouts of the employee. After all, anything could have befallen the employee. It may not be a case of desertion, in all circumstances.
18. In the case of *Mary Mumbi Kariuki v Director, Pamoja Women Development Programme* [2015] eKLR the Court determined that: -

“...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.”
19. In the instant case, despite alleging desertion on the part of the claimant, the respondent did not act prudently as expected of an employer faced with similar circumstances.
20. In absence of evidence that the claimant was absent from duty without permission and the respondent having failed to prove that it attempted to establish his whereabouts, I am led to conclude that the claimant's version of events that he was terminated from employment, is more probable.

Was the claimant's termination fair and lawful?

21. Section 43(1) of the *Employment Act*, places the burden of proving reasons for termination on an employer and failure to do so, renders such termination unfair. In addition, section 45 (2) of the *Employment Act*, qualifies a termination of employment as unfair where the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.



22. The respondent has insisted that the claimant deserted duty for four (4) months and his whereabouts were unknown. Despite this assertion, the respondent has not adduced any evidence to back up the same. As stated herein, the respondent did not produce the relevant work attendance records for the four (4) months it alleges the claimant was absent.
23. It failed to discharge its evidential burden under section 43(1) of the *Employment Act* by proving the alleged desertion on the part of the claimant.
24. In any event, absence from work without permission constitutes one of the grounds for dismissal under section 44(4) (a) of the *Employment Act*. As a matter of fact, the claimant's contract of employment provides the same as a ground for termination. Hence, if indeed, the claimant was absent from work without permission, why didn't the respondent exercise this option under the contract of employment and terminate his employment?
25. In addition, the respondent was required to comply with the requirements of sections 45 (2) (c) and 41 of the *Employment Act*. In this regard, it was required to notify the claimant of the intended termination and the reasons thereof in a language he understands and in the presence of another employee or a shop floor union representative.
26. In this case, if at all the claimant was absent from work without permission, the respondent had all the right as an employer to subject him to a disciplinary process in line with the requirements of section 41 of the *Employment Act*. This entailed giving the claimant an opportunity to explain his absence from work.
27. The respondent stated that it was not in a position to subject the claimant to a fair hearing on account of his absence. This cannot be. The parties were in an employment relationship hence had established channels of communication. As a matter of fact, the claimant's contact is provided in his contract of employment.
28. Accordingly, and if at all acting prudently, the respondent ought to have employed the established means of communication and invited the claimant to tender his response to the allegations of desertion.
29. In absence of any proof of compliance with the mandatory provisions of section 41 of the *Employment Act*, the respondent is at fault.
30. The total sum of the foregoing is that the reasons for the claimant's termination have not been proved and there is no evidence that he was given an opportunity to present his explanation or defence prior to termination.
31. The end result of the respondent's actions and/or omissions is that the claimant was unfairly and unlawfully terminated from employment contrary to sections 43(1) and 45(2) of the *Employment Act*.
32. I will sum up my findings by reiterating the legal threshold established by the Court of Appeal in the case of Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR thus: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.



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.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer."

Reliefs

33. Having found that the claimant's termination was unfair and unlawful, I will award him six (6) month's gross salary as compensatory damages.
34. The claimant is further awarded one (1) month's salary in lieu of notice as provided for under his contract of employment.
35. claimant is awarded salary for the month of August, 2014. Despite the respondent stating that it paid the claimant's salary, there was no evidence to prove as much, hence he is entitled to the same.
36. The claim for severance pay is denied as the same is only awarded in instances of redundancy, which is not the case herein.

Orders

37. To this end, Judgment is entered in favour of the claimant against the respondent and he is awarded: -
 - a. Compensatory damages in the sum of Kshs 69,000.00 which sum is equivalent to six (6) months of his gross salary.
 - b. One (1) month's salary in lieu of notice being Kshs 11,500.00.
 - c. Salary for the month of August, 2014 being Kshs 11,500.00.
 - d. The total award is Kshs 92,000.00.
 - e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
 - f. The claimant shall also have the costs of the suit.

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

STELLA RUTTO

JUDGE



Appearance:

For the Claimant Mr. Maithya

For the Respondent Mr. Mutitu

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**