



**Nasimolo v Mustafa (Cause 275 of 2017) [2022] KEELRC 1531 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1531 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**  
**CAUSE 275 OF 2017**  
**NJ ABUODHA, J**  
**JUNE 8, 2022**

**BETWEEN**

**MARTIN KITUTU NASIMOLO ..... CLAIMANT**

**AND**

**MOHAMMED MUSTAFA ..... DEFENDANT**

**JUDGMENT**

1. The claimant alleged that at all material time he was working for the respondent as a general worker at the respondent's residence within Kitale. He worked from November 23, 2007 to September 18, 2013 when the respondent summarily dismissed him on unfounded allegations of theft for which he was not charged in court and no report made to the police. According to the claimant the dismissal was without lawful excuse, legal or probable cause.
2. Prior to the dismissal, the claimant had been injured in the course of his duties and was dismissed for seeking compensation.
3. The claimant reported the dismissal to Trans-Nzoia Labour Officer who handled the dispute without success. At the Labour Office the respondent purportedly and unilaterally calculated the claimants benefits to be Ksh.18,000/= which was an underpayment since it excluded compensation for unfair termination.
4. The respondent on its part pleaded that he was the sole proprietor of Kitale Glass and Hardware and one of the reasons for the hardware's good reputation and success was in diligence, professionalism reliability and honesty of its sole proprietor and employee.
5. To foster its objections, the respondent appointed the claimant as a watchman through a letter of appointment dated November 23, 2010.
6. As per clause 5 of the letter of appointment the claimant was expected to be alert and patrol the Company's compound regularly while on duty at night.



7. Clause 4 provided that the claimant was to always lock the gate of the company and no strangers were to be allowed into the compound without permission.
8. The claimant fundamentally breached his terms of appointment when on or about August 31, 2013 he either stole and hid timber near the fence of the hardware and organized for unauthorized persons to access the compound by breaking into the fence and taking the said timber.
9. The incident was reported to Kitale Police Station and claimant asked to explain but he just denied being responsible and thereafter absconded duty without the employer's leave or notice. The respondent therefore decided to summarily dismiss the claimant from duty in accordance with clause 7 of this letter of appointment.
10. The respondent contended that the claimant having been dismissed in accordance with his contract of employment and section 44(4) of the Employment Act was not entitled to the terminal benefits as claimed.
11. The respondents, however on humanitarian ground offered to pay the claimant Ksh.18,000/= which sum was calculated by the County Labour Officer hence not unilateral as alleged by the claimant.
12. At the oral hearing the claimant stated that he used to work as a general worker and also doubled as a Security Guard. He started to work in 2007 and worked until 2013 when he was terminated. According to him he was not told the reason for the termination. He was issued with a termination letter. The respondent claimed he stole. He was not taken through any disciplinary hearing. He reported the dispute to the Labour Officer and the respondent was summoned. When he appeared, he offered to pay the claimant Ksh.18,000/= but he refused the money.
13. The claimant further stated that he got injured while at work. He was cut by glass while off loading from the lorry. He stated that he had a medical report showing the notice of his injuries. In cross-examination he stated that he was employed in 2007 but the employment letter he had in Court showed he was employed on November 23, 2010. The claimant further denied that he was employed as night guard. It was his evidence that he worked in the respondent's compound during the day.
14. Concerning his injuries, he stated that he was injured on September 20, 2011 and went to Mt. Elgon Hospital and that he had a letter from the hospital. He denied going to hospital after four years.
15. Regarding theft, he denied knowledge of the theft and that he used to work during the day and that he was not in the respondent's compound during the theft incident. The claimant further stated that he told the Labour Officer that he was employed by the respondent as Security Guard and that the calculation of his dues was done by the Labour Officers.
16. Respondents witness Mr. Mohammed Mustafa stated that he employed the claimants as a guard. He recorded a witness statement which he adopted as his evidence in chief.
17. According to him the claimant was terminated due to wrong doing at his premise. There was a theft incident at night and the matter was reported to the police but he preferred not to pursue prosecution. The claimant never met him after the incident and that he went straight to the Labour Office and complained. He was called and the Labour Officer computed the claimant's dues.
18. In cross -examination he stated that he had looked at the computation and that he was not the one who prepared it but he agreed with it.
19. He denied knowledge of injury to the claimant. Mr. Mustafa further stated that he met the claimant for the first time in 2010 and that he did not dispute the claimant had worked for him for six years.



20. Concerning the claimant's duties, he stated that the claimant used to guard at night and that he absconded duty after the theft incident.
21. He asked the claimant to see him but he never turned up. He had a letter showing the claimant was called to go and see him but the claimant never went. The claimant refused to see him so he could not be taken through any disciplinary hearing.
22. It is a cardinal rule of evidence that a person who makes an allegation and seeks that the Court relies on such allegation to enter a judgment in his favour must prove those allegations to the required standard of proof.
23. The claimant herein alleged that he was employed by the respondent as a general worker in November, 2007 and that he worked for the respondent until September, 2013 when the respondent summarily dismissed him on unfounded allegation of theft. According to the claimant he was dismissed after he got injured in the course of his duties and sought to be compensated.
24. The Court has reviewed and considered the claimant's allegations vis-à-vis his documents he filed in support of his claim and a few inconsistencies emerge.
25. First, the claimant alleges that he was employed by the respondent in 2007 yet the letter of appointment produced by him shows he was employed on November 23, 2010. Second, the claimant alleges that he was employed as a general worker yet his said letter of appointment shows he was employed as a watchman. Third the claimant stated in his evidence that he got injured on September 20, 2011 and went to Mt. Elgon Hospital yet no treatment report was produced to show he was treated there on the alleged date. The claimant only produced an out-patient continuation sheet issued on October 4, 2013 claiming he was treated at Mt. Elgon Hospital-Kitale.
26. These inconsistencies on that part of the claimant can only lead to the conclusion that he is not a witness for truth.
27. The most probable truth about the claimant is that he was hired by the respondent as a watchman and that he absconded duty when theft occurred at the respondent's premises fearing he could be arrested. The claimant himself produced the dismissal letter dated September 18, 2018 accusing him of absconding duty hence the decision to summarily dismiss him.
28. In a claim for unfair termination the burden of proof that an unfair termination has occurred is on the employee, in this case the claimant. The Court has become of the view that the claimant has not discharged this burden with the consequence that this claim will be dismissed.
29. The respondent had however offered to pay the claimant Ksh.18,000/= which was assessed by the County Labour Office.
30. The Courts hereby orders the payment of the same provided the claimant returns the respondents property in his possession as required and clears with the respondent.
31. In conclusion the suit stands dismissed with no order as to costs.
32. It is so ordered

**DATED AT ELDORET THIS 8<sup>TH</sup> DAY OF JUNE, 2022**

**DELIVERED THIS 8<sup>TH</sup> DAY OF JUNE, 2022**

**ABUODHA J.N**

**JUDGE**

