



**Mutua v Rushabh Industries Limited (Cause 872 of 2017)
[2022] KEELRC 1489 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1489 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 872 OF 2017
SC RUTTO, J
JUNE 10, 2022**

BETWEEN

MWANZIA MUTUA CLAIMANT

AND

RUSHABH INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. The claimant avers through his memorandum of claim dated 10th May, 2017, that he was employed by the respondent on 27th January, 2009 as a machine attendant. That he served the respondent diligently without blemish. He further states that he was dismissed from employment on 24th October, 2016, upon returning from upcountry where he had gone to attend to his ailing wife. According to the claimant, his dismissal unlawful, inhumane and unfair, hence he seeks against the respondent the sum of Kshs 478,275/= being notice pay, salary for October, 2016, unpaid leave days, compensatory damages and untaken public holidays.
2. The claim did not go without opposition. The respondent denied dismissing the claimant from duty. It averred that the claimant absconded and disappeared from his workplace without permission for about a month. That this amounted to gross misconduct and his allegations that he was dismissed, are a fabrication meant to defraud the respondent. That indeed, his abscondment of duty resulted in the respondent experiencing substantial loss. The respondent asked the Court to dismiss the claim with costs.
3. The matter proceeded for hearing on 25th January, 2022 and each side called oral evidence.

Claimant's case

4. 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.



5. It was the claimant's testimony that on 16th October, 2017 he reported to work, ready to attend to his duties. That there was a blackout at the respondent's premises hence all employees were allowed to go back home and report the following day for assignment of duty. That on that day, he asked for permission from his boss Mr. Sunil, to travel upcountry to attend to his ailing wife.
6. That he was given permission for one week and upon resuming work, on 24th October, 2016, he was held back and was not allowed to attend to duty. That his boss Mr. Sunil dismissed him from employment on that day and informed him that his services were no longer required. He denied absconding duty. He told Court that he was neither given an explanation for his dismissal from employment nor notice prior to. He concluded his testimony by stating that his termination was unfair and unlawful hence prayed for compensation.

Respondent's case

7. The respondent tendered oral evidence through Mr. John Muli, who testified as RW1. He identified himself as a supervisor in charge of machine operations and maintenance at the respondent company. At the outset, he sought to rely on his witness statement and bundle of documents filed on behalf of the respondent and which he asked the court to adopt as part of his evidence of chief.
8. RW1 admitted that the claimant was an employee of the respondent. That on 16th October, 2016, the claimant was to work on the night shift but there was a blackout, hence all employees were allowed to go home and report the following day, which was on a Monday. That the claimant never reported back to work as expected on Monday, and was away for almost a month. That he called the claimant through phone but he was unreachable. That the claimant never asked for permission to be away.
9. It was RW1's further testimony that there were rumours at the time, that the claimant was working elsewhere. He further testified that the machine which the claimant was tasked to operate, required two people, one on the day shift and the other one, on the night shift. That due to the claimant's absence from work, the machine was idle during the day, thus leading the respondent to incur substantial loss. That as such, the respondent had to fill the vacant position left by the claimant. RW1 summed up his testimony by telling Court that the claimant was paid all his dues including full salary for the month he absconded duty.

Submissions

10. It was submitted on behalf of the claimant that the respondent had not proved that it made effort to reach him, if at all he absconded duty. Reliance was placed on the authorities of *Simon Mbiti Mbane vs Inter Security Limited* (2018) eKLR and *Joseph Nzioka vs Smart Coatings Limited* (2017) eKLR. It was further submitted that the claimant was not subjected to a hearing as contemplated under section 41 of the *Employment Act*. The Court was referred to the decision of *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited* Cause No. 74 of 2013.
11. The respondent submitted that the claimant absconded work from 16th October, 2016 and only returned in mid November, 2016. That as such, he was liable for summary dismissal. That the claimant had not discharged the statutory burden under section 47(5) of the *Employment Act*, by proving that he had been unfairly terminated.

Analysis and determination

12. Having considered the pleadings herein, the evidentiary material before me and the submissions on record, the questions calling for resolution by the Court are: -



- i. Whether the claimant absconded duty or was dismissed from employment?
- ii. Whether the claimant was subjected to due process?
- iii. Is the claimant entitled to the reliefs sought?

Abscondment of duty or dismissal?

13. As expected, both parties have presented different versions as to how the employment relationship ended. Whereas, the claimant avers that he was dismissed from employment when he resumed duty upon attending to his ailing wife upcountry, the respondent contends that he absconded duty and went to work elsewhere. Consequently, it all boils down to a credibility contest.
14. As stated herein, the respondent has asserted that the claimant absconded duty with effect from 16th October, 2016. It was common ground that there was a blackout at the respondent's premises on that day. As such, the respondent avers that the claimant was expected to resume duty the following day but he was a no show. On the other hand, the claimant avers that he was away having obtained permission from his boss, Mr. Sunil.
15. Notwithstanding the claimant's assertions, there was no evidence from his end, proving that he had been granted permission to be away by Mr. Sunil. From the claimant's own admission, he was away from work for about eight (8) days. In a normal employment setting, this is a considerably long period of time, which would ordinarily be accompanied by written permission. If indeed it is true that the claimant was granted permission to be away, then he did not have any evidence to prove the same. Otherwise, one wonders why the claimant would be granted permission to be away by his boss, then later on be accused of absconding duty.
16. From the evidence of RW1, the claimant's services were highly required at the respondent company since the machine he used to operate, required two people. That due to the claimant's absence, the machine would remain idle during the day. That this idleness resulted in the respondent incurring huge losses as the machine would need to be left running for three (3) hours, upon being started. That it was on this basis that the respondent hired someone else to take up the claimant's position.
17. In light of the foregoing, it is therefore doubtful that the respondent would permit the claimant to be away for a significantly long period of time, knowing well that it did not have a replacement for him and the resultant losses from the machine being idle. It does not sound believable that the claimant was granted permission to be away as he alleges.
18. The foregoing set of circumstances, lends credence to the respondent's assertion that the claimant indeed absconded duty.
19. Accordingly, the respondent had justifiable cause to terminate the claimant's employment on account of abscondment of duty, which notably, is a ground for dismissal under section 44 (4) (a) of the Act.
20. Having determined as such, I now turn to consider whether the claimant was subjected to due process prior to his exit from the respondent's employment.

Whether the claimant was subjected to due process

21. Having found that the claimant absconded duty, the respondent had all right to take disciplinary action against him under the *Employment Act*. Be that as it may, there is no evidence that the respondent took any step upon noting that the claimant had absconded duty.



22. The respondent upon realizing the claimant's absence, ought to have reached out to him and asked him to explain his absence from work. There is no evidence of communication at all to the claimant from the respondent's end, citing him for abscondment of duty or asking him to show cause why disciplinary action should not be taken against him.
23. RW1 testified that he tried reaching the claimant through phone but he was unreachable. However, there was no accompanying evidence in whatever form or manner, to back up this assertion.
24. As stated herein, the respondent had all the reason to commence disciplinary action against the claimant for abscondment of duty. As such, it was duty bound to comply with all the legal requirements stipulated under Section 41 of the *Employment Act*. This entailed notifying the claimant of the reasons it was considering terminating his employment in a language he understands and in the presence of an employee of his choice or a union representative. The respondent did not tender any evidence before court to prove that it indeed issued a notification to the claimant to that effect or accorded him a hearing so as to allow him give his side of the story. It is at this juncture that the claimant would have referred to the permission granted to him by Mr. Sunil, if at all.
25. Since the parties were in an employment relationship for a significant period of time, they must have established channels of communication hence there were means through which the respondent could have reached the claimant and notified him of its intention to take disciplinary action against him. There is no evidence that it attempted to do this.
26. In light of the foregoing, it is apparent that despite the fact that the respondent had justifiable reason to terminate the claimant, it did not comply with the stipulated statutory provisions, thus his dismissal was procedurally unfair.
27. In the end, the claimant's dismissal was not lawful.
28. Having so found, what reliefs avail the claimant?

Reliefs

Salary in lieu of notice

29. As I have found that the claimant was not terminated in line with fair procedure, I will award him one (1) month's salary in lieu of notice.

Compensatory damages

30. As I have found that the respondent had valid grounds to terminate the claimant but failed to follow the stipulated procedure, I will award him four (4) months' gross salary in compensation as damages under this head.

Salary for October, 2016

31. There was no dispute that the claimant worked upto 16th October, 2016. In as much as the respondent stated that the claimant was paid his full monthly salary despite absconding duty, no evidence was produced to prove the same. The Court therefore finds that he is entitled to salary for 16 days in October, 2016.



Unpaid leave days and public holidays

32. The respondent produced before Court payment vouchers as proof that it paid the claimant leave allowance and overtime due. Notably, the claimant did not deny receiving the payments. Further, and in the face of the evidence by the respondent, the claimant did not counter the same and state the specific periods that the leave and overtime remained unpaid. In the circumstances, the relief is declined as the claimant has not proved his entitlement to the same.

Orders

33. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -

- a. Four (4) months' gross salary in compensation.....Kshs 68,652.00
 - b. Salary for 16 days in October, 2016.....Kshs 9,153.60
 - c. One (1) month salary in lieu of notice.....Kshs 17,163.00
- Total Kshs 94,968.60

34. The total award will be subject to interest at court rates from the date of judgment until payment in full.

35. 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. Omamo

For the Respondent Mr. Kimamo

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

