



**Kiara v World Poles Limited (Cause 188 of 2017)
[2022] KEELRC 1533 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 188 OF 2017
NJ ABUODHA, J
JUNE 8, 2022**

BETWEEN

SILAS JUMA KIARA CLAIMANT

AND

WORLD POLES LIMITED DEFENDANT

JUDGMENT

1. The claimant alleged that he was employed by the respondent on 8th September, 2014 as a cleaner earning a monthly salary of Ksh.15,000/= and worked with dedication until February, 2016 when the respondent allegedly wrongfully and unprocedurally terminated his service and without valid reasons or justification.
2. According to the claimant, his service was terminated because he joined a union, further the termination violated section 41(1) of the *Employment Act* in that the respondent never explained to him the reasons for the termination and neither did the respondent prove that the said reasons for termination were valid reasons.
3. The claimant further averred that the alleged reason given that claimant's duties had reduced was malicious and calculated to form a basis for unfair termination of his service.
4. The respondent on its part pleaded that it employed the claimant as a cleaner on a monthly salary of Ksh.8000 and not Ksh.15,000/= as alleged.
5. According to the respondent, the claimant was dismissed for gross misconduct which included absenteeism, fighting in the course of duty, and willful negligence. The respondent further accused the claimant of being intoxicated during working hours.
6. The respondent alleged that on January 22, 2016 the claimant was involved in a brawl with one Irene Sang causing her grievous bodily harm (dislocation of left hip joint).



7. The claimant having committed an offence within the course of employment the respondent had a valid and bona fide reason to terminate his service.
8. At the hearing, the claimant stated that he was employed by the respondent on September 8, 2014 as a moulding cleaner. His monthly salary was Ksh.15,000/= and that he was never paid house allowance. He left on February 24, 2016 and according to him he was dismissed because he asked his colleagues to join a union where he was already a member. He was thereafter given a warning letter but was not about asking his colleagues to join the union. The claimant relied on his witness statement dated January 25, 2016 as his evidence in chief and also on his documents filed with the claim.
9. Regarding Irene Sang' he stated that she was his workmate and that he asked her to join the union as well. He admitted having fight with her but not a serious one. According to him, Irene misplaced her phone and accused him of taking it. She got enraged and picked a piece of metal and wanted to hit him so he defended himself from being hit. The manager took advantage of this and dismissed him.
10. It was his evidence that no meeting was called about the incident between him and Irene. They were warned about it and he reconciled with Irene thereafter. The claimant denied deserting duties and denied receiving a letter about desertion of duties and that the signature on the said letter was not his. He also denied receiving the summary dismissal letter dated March 20, 2016.
11. In cross- examination he stated that he was employed on September 8, 2014 but was not issued with an appointment letter. Concerning his salary, he stated that his pay slip showed his salary was Ksh.8,750/= as basic pay.
12. The claimant further stated that his problem was that he encouraged colleagues to join the union however there was nothing written about the union issue but was told about it verbally. He denied taking Irene's phone and that he was subjected to a body search and no phone was found on him.
13. According to the claimant, he held the metal bar Irene wanted to hit him with and she tripped on a hose pipe and fell. It was agreed that the matter be resolved amicably between them.
14. It was further the claimant's evidence that he was not given any money and that Ksh.5000/= was deducted from his salary without his consent. He never agreed he would reimburse Irene's hospital bills and that they were never suspended. He never refused to go to work and that it was the manager who told him never to go back to the respondent's premises. Regarding the signatures, he stated that he never disputed them earlier but they were a forgery. According to him he was never issued with a dismissal letter.
15. Regarding his dues on termination, the claimant stated that he was paid Ksh.2,350/= as salary and he signed for it. He further stated that he never went on leave for the period he worked and that he had nothing to show he worked overtime.
16. The respondent's witness Mr. Gideon Kirwa Kosgey stated he used to be a manager at the respondent and that he recorded a statement on December 21, 2016 which he adopted as his evidence in chief.
17. Regarding the claimant, he stated that the claimant was employed as a cleaner in the factory and was employed in July, 2015. His salary was Ksh.500/= per day by the time he left. It was further his evidence that the claimant's monthly pay was pegged on days worked in the month.
18. According to him, in January, 2016 there was a misunderstanding between one Irene and the claimant. Her phone was lost and was traced to the claimant. A fight therefore ensued between the claimant and Irene and Irene got hurt in the process.



19. He asked the security to investigate and they confirmed the incident. Irene wanted to sue for assault but he sat them down and they agreed to settle the matter amicably. The claimant agreed to settle Irene's hospital bills but he said he had no money so the respondent settled the bills on his behalf.
20. Mr. Kosgey further stated that because fighting was something the respondent never condoned both Irene and the claimant were suspended for two weeks. After two weeks, only Irene resumed. The claimant never came back. The respondent wrote to him to resume work within seven days in default he stood fired. The letter was before the court. The claimant never responded and never came back to work. The respondent consequently issued him with a summary dismissal letter.
21. He denied the claimant was employed in 2014 and that the respondent commenced operations in 2015. On claimant's earnings he stated that the claimant was earning Ksh.500 per day and if he worked for 30 days he would earn Ksh.15,000/= however his salary was based on number of days worked. Mr. Kosgey further stated that he was called by the Labour Officer and he explained the respondent's position and the labour officer agreed with him.
22. Concerning overtime, Mr. Kosgey stated that the claimant had to show he worked overtime. According to him, workers had off-days every week and the shift system kept changing. No one was on a fixed shift.
23. In cross-examination he stated that there was procedure for termination and that termination should be for valid reasons. He further stated that employee records were kept by the employer and is the one to produce the same when called upon. The documents included attendance records, overtime and salary.
24. Regarding the alternation with Irene, it was his evidence that the issue was amicably resolved between Irene and the claimant and never formed the basis for the termination. The claimant was terminated on account of desertion.
25. The respondent's gates were manned by Security and all workers signed in. The claimant was never barred from attending work.
26. Concerning the claimant's salary, he stated that he was paid salary for days worked less the amount the respondent paid on account of Irene's hospital bills.
27. The respondent herein stated that he dismissed the claimant for absenting himself from duty without lawful cause or authority. According to the respondent, the claimant was suspended after a physical confrontation involving him and a fellow member of staff, Irene. Both the claimant and Irene were suspended as a disciplinary measure. Irene resumed work after the suspension but the claimant according to the respondent did not.
28. According to the claimant, he was dismissed because he used to encourage his colleagues to join the trade union he had become a member of. The claimant alleged that the respondent took advantage of the fight between himself and Irene to dismiss him while the real reason was his membership to the union and his attempt recruit his colleagues to the union.
29. It was common ground that there was a physical fight between the claimant and his colleague, Irene. This was obviously an unacceptable behaviour in workplace and a justifiable ground for summary dismissal.
30. However, the respondent stated that the only disciplinary measure they took against the claimant and Irene was suspension for two weeks for both of them. Upon the expiry of the two weeks suspension, only Irene returned to work while the claimant never did.



31. The respondent therefore considered the claimant to have absconded duty and allegedly issued the claimant with the letter dated March 24, 2016 summarily dismissing the claimant for deserting duties. These two letters did not bear the claimant's address and further there was no evidence how they were transmitted to the claimant and whether he received them.
32. The claimant on the other hand claimed he was a member of Kenya Union of Printing, Publishing, Paper Manufacturers Pulp & Packing Industries and was attempting to recruit his colleagues to the union hence the reason for his dismissal. The claimant attached among his bundle of documents, a letter dated February 18, 2016 from his said union accusing the respondent of terminating the claimant's service and seeking a meeting to settle the matter on February 25, 2016. The letter does not raise the issue of dismissal on grounds of union membership as alleged and further nothing was presented by the claimant on what became of the unions intervention.
33. Under section 47(5) of the *Employment Act*, in a claim for unfair termination, the burden of proving that an unfair termination has occurred is on the employee while the burden of proving reason or reasons for termination or justification thereof is on the employer. The burden of proof is exclusive and separate and failure by one party to discharge their burden does not lessen the other's burden.
34. The respondent alleged that it dismissed the claimant on grounds of desertion of duty but did not sufficiently show that it brought to the attention of the claimant the letter dated February 24, 2016 and the letter of summary dismissal dated March 20, 2016. As observed earlier the letters did not bear the address upon which they were delivered and no evidence was led on how they were delivered on the claimant.
35. Desertion of duty is a valid ground for summary dismissal however before an employer can rely on it, evidence must be shown that reasonable steps were taken to contact the employee prior to dismissal on grounds of desertion. This did not happen in this case. The court therefore finds and holds that although the respondent could have been justified in dismissing the claimant on grounds of desertion, the respondent failed show how it took reasonable steps to contact the claimant to call upon him to show cause why his employment should not be terminated on grounds of desertion. The termination is therefore found unfair.
36. The claimant made a claim for severance pay, this will be rejected because the termination was not on account of redundancy. The claim for overtime, work on weekends and public holidays were not sufficiently proved. The claimant did not lead evidence on the nature of the work he performed that necessitated that he worked on weekend, public holidays and overtime. It is true that the duty of keeping employment records is on the employer however an employee must reasonably set out the background of the claims he or she is making to enable the employer check and produce the records required. It is not enough to make broad and sweeping allegations without setting reasonable details of the claims put forward.
37. The claimant further made claim for underpayment without presenting proof of skills he possessed and the minimum wage payable for the skill to enable the court compare and assess whether there was indeed underpayment. Further, the claimant never tabled before court the applicable Wage Order for perusal. These claims are therefore not proved.
38. In conclusion the court from reasons advanced above, award the claimant as follows:
Ksh.
 - a. One month's salary in lieu of notice 30,000
 - b. Six months wages as for unfair termination 180,000



210,000

- c. Costs of the suit
- d. Items (a) and (b) shall be subject to taxes and statutory deduction.

39. It is so ordered.

DATED AT ELDORET THIS 8TH DAY OF JUNE, 2022

DELIVERED THIS 8TH DAY OF JUNE, 2022

Abuodha J.N

JUDGE

