



**Ndunda v Insight Management Consultant Limited (Cause
2371 of 2016) [2022] KEELRC 1203 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2371 OF 2016**

JK GAKERI, J

JUNE 2, 2022

BETWEEN

WINFRED WAYUA NDUNDA CLAIMANT

AND

INSIGHT MANAGEMENT CONSULTANT LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced this suit by statement of claim filed on November 23, 2016 alleging unlawful or wrongful dismissal and non-payment of terminal benefits.
2. The claimant prays for:
 - i) Two months' salary in lieu of notice Kshs.29,571.00
 - ii) Unpaid annual leave for 9 years (189 days x 14,785.70) Kshs.133,071.30
 - iii) House allowance for 9 years (10% x 14,785.70 x 108 months) Kshs.159,685.56
 - iv) Service pay Kshs.133,071.30
 - v) 12 months' compensation (Kshs14,785.70 x 12 months) Kshs.177,428.40Total Kshs.632,827.96
3. The claimant case is pleaded as follows:
4. That he was employed by the respondent in 2007 and discharged her duties diligently for 9 years.
5. That on or about June 14, 2016, she was summarily dismissed by the respondent without justification and has failed and neglected to pay terminal dues.



Respondent's Case

6. The respondent's response to the claim was filed on January 11, 2017. In its defence, the respondent avers that the claimant was in employment until May 11, 2016, but denies that she discharged her duties diligently.
7. That on May 11, 2016, the claimant was instructed by the supervisor to redo some work she had inappropriately done on May 9, 2016 but declined stating that she would rather resign than obey instructions of the supervisor.
8. That the claimant walked out of the work place and never returned.
9. It is averred that the claimant's husband was requested to fill in the claimant's absenteeism form for May 17, 2016 to June 2, 2016 but which he did. The Claimant however, did not return even after the leave days granted by the

Respondent.

10. It is the respondent's case that the daily wage was inclusive of house allowance.
11. Finally, the respondent avers that NSSF deductions were remitted dutifully and prays for dismissal of the suit with costs.

Claimant's Evidence

12. In her written statement, the claimant rehashes the contents of the statement of claim.
13. The claimant testified that on June 14, 2016 after reporting to work, she was summoned to the office and informed by the Supervisor/Manager that her employment had been terminated.
14. It was her testimony that she was employed on February 24, 2007 and was paid on February 3, 2007. She denied having absconded duty. That Mr. Barasa neither called her nor signed a document on her behalf. She testified that her salary was Kshs.650/= per day paid weekly though initially paid on a daily basis.
15. On cross examination, the claimant testified that her pay was Kshs.650/= or Kshs.500/= per day and that she was unaware that the daily wage included house allowance.*
16. Strangely, the claimant disowned the salary mentioned in the memorandum of claim. It was her testimony that the wage or salary varied from time to time as evidenced by the bank statement. For instance, in March, April and May 2016, the claimant was paid Kshs.9,537/=:, Kshs.2,790/= and Ksh.8,103/= respectively and confirmed that she had no other employment at the time.
17. The witness confirmed that she had no bank statements other than for March, April and May 2016.
18. Further, the witness confirmed that the employer remitted NSSF contributions.
19. The claimant admitted that her statement made no reference to leave pay or leave generally. The witness stated that she was not paid for leave. That access to the work premises was by card.
20. It was her testimony that she was not married to one Mr. Barasa, the alleged husband. She admitted that she was away on June 14, 2016.
21. On re-examination, the witness stated that she was paid per day and the amount varied from time to time.



22. That Mary the supervisor told her to go away.

Respondent's Evidence

23. RW1, Lorraine Mutio, the respondent's Human Resource Officer adopted the written statement and was cross-examined. It was her testimony that the Claimant was employed by the respondent in 2007 as a watcher and served on a casual basis until May 11, 2016. The duty was to ensure that bundles of packets from the 10 machines assigned were in a good and acceptable orders in terms of weight and quality.
24. That on May 9, 2016 one bundle was rejected because some pieces of polythene bags were leaking, that she was summoned on May 11, 2016 and requested to redo the bundle but refused and walked out of the workplace and did not return.
25. The witness testified that communication to the claimant was through one Evans Barasa, her husband yielded no results and the claimant was presumed to have deserted work and the respondent had no opportunity to subject her to a disciplinary process.
26. That wages were paid fortnightly for the aggregate number of days worked and the daily wage was inclusive of house allowance.
27. Finally, the witness confirmed that the claimant was a member of the NSSF.
28. On cross-examination, the claimant confirmed that the claimant was working at High Plastics Limited, but an employee of the respondent.
29. That Mr. Barasa was the claimant's husband although the witness had no evidence of the relationship.
30. That the witness attempted to contact the claimant through Mr. Barasa yet she had her contacts. That she did not write to her on the issue of desertion.
31. RW1 testified that access to the work place was exclusively by clocking in using the card and the claimant was paid leave days based on the days worked.
32. It was her testimony that the claimant's salary was low because of her absence for many days and her pay was Kshs.550/= per day.
33. On re-examination, the witness testified that Evans Barasa was the claimant's husband and they were living together and the two had information about each other and Evans Barasa had filled in the leave forms as a spouse.
34. Finally, the witness testified that the claimant's employment ended when she stopped working and the respondent had no business enquiring about her whereabouts.

Claimant's submissions

35. The claimant identifies two main issues for determination, namely;
- i) Whether the claimant's dismissal was unlawful and unfair;
 - ii) Whether the claimant is entitled to the reliefs sought.
36. On the 1st issue reliance is made on the provisions of section 44 and 45 of the [Employment Act](#), 2007 to urge that termination of the claimant's employment had to pass the fairness test.



37. That the claimant reported to work in March 2007 but the supervisor told her that she had been terminated. The submission captures the wrong date of the alleged termination of employment.
38. As regards attendance, it is submitted that the attendance sheets on record should not be relied upon as they are not signed by the employer or employee and were not produced by the makers and have no certificate under section 35(4) of the *Evidence Act*.
39. That the attendance sheets are thus inadmissible.
40. It is the claimant's submission that the reasons advanced for dismissal of the claimant were unsatisfactory under section 44(4) of the *Employment Act*.
41. As regards procedure, it is submitted that the provisions of the *Employment Act* germane to procedure in section 41 was not complied with. The decision in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR is relied upon in support of the submission.
42. On reliefs, it is submitted that the claimant was entitled to 2 months' salary in lieu of notice because of the manner in which she was dismissed. That the court had discretion to vary the amount payable in lieu of notice depending on the circumstances.
43. On service pay, the claimant relies on section 35(5) of the Act. It is submitted that section 35(6) does not apply to the claimant because the NSSF statement on record is inadmissible because it was a printout presented as a reactionary defence.
44. It is the Claimant's submission that Section 20 requires an itemised pay slip or statement setting out the amounts due to the Claimant including the statutory deductions.
45. As regards the 12 months compensation under section 49 of the *Employment Act*, it is submitted that the Court should examine the circumstances that led to the termination as well as the employer's conduct which evidences a non-caring employer.
46. There are no specific submissions on leave pay and house allowance.

Respondent's Submission

47. The respondent identifies two issues for determination;
 - i) Whether the claimant resigned on May 11, 2016 and/or consequently deserted duty from May 11, 2016;
 - ii) Whether the claimant is entitled to the reliefs sought.
48. On the first issue, it is submitted that the Claimant resigned or deserted duty from May 11, 2016. Reliance is made on the Black's Law Dictionary and the decisions in *Stanley Omwoyo Onchwiri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR and the *South African case in Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) for the definition and explanation of desertion as is the evidence of Lorraine Mutio, RW1.
49. It is submitted that attempts to reach her through Mr. Evans Kuloba Barasa fell through. Reliance is also made on the absenteeism form on record allegedly completed by Mr. Evans Barasa, the Claimant's work mate.
50. That the claimant and Mr. Barasa lived together near other employees.



51. The decision in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* [2009] eKLR is relied upon to urge that marriage by presumption could be deciphered from long cohabitation and general repute.
52. That the copy of casual worker application from relied upon by the claimant had been signed more than 9 years earlier.
53. It is the respondent's case that the claimant deserted duty on May 11, 2016 and the court is urged to hold as much. The decision in *Azmina Mohammed Akbar Khan v Victoria Furnitures Limited* [2018] eKLR is relied upon to buttress the submission.
54. It is further submitted that the claimant did not substantiate the allegation that she was dismissed on June 14, 2016, a day on which according to the respondent, she did not report to work as attendance register relied upon the respondent confirms.
55. That access to the workplace was by clocking in using a card and attendance sheets showed that she was not at work on that day. It is submitted that the Respondents evidence that the Claimant was not at the workplace at any time after May 11, 2016 was not controverted.
56. The decision in *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR is relied upon to urge that the employee is entitled to resign in which case he/she terminates the contract of employment.
57. It is the respondent's submission that the claimant terminated her employment by word of mouth and her employment was not terminated by the Respondent on any day as alleged.
58. As regards the reliefs sought, it is the Respondent's submission that the 2 months' pay in lieu of notice is not payable under section 35(1) of the *Employment Act* because she left employment voluntarily on 11th May 2016 in protest when she was instructed to redo some work.
59. On service pay, it is submitted that the claimant has no entitlement to service because she was a member of the NSSF and the respondent paid her contributions dutifully until May 2016, as the NSSF statement on record shows. Section 35(6) of the *Employment Act* and the decision in *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR are relied upon to reinforce the submission.
60. As regards leave pay, it is contented that the casual staff leave encashment list shows that the claimant had been paid leave dues from 2007 to 2015.
61. That she received Kshs.9,891/= for the June 27, 2007 to 31st Dec 2011 and Kshs.2,772/= for the January 1, 2015 to December 15, 2015 and signed a discharge voucher.
62. As regards the 12 months' compensation, it is submitted that no compensation is due to her because she resigned on May 11, 2016 and even if the contract was terminated by word of mouth on June 14, 2016, she had signed a contract as a casual employee and the same terminated on that day.
63. That as demonstrated by leave payment, the claimant's service to the respondent was neither regular nor uninterrupted. Relatedly, the bank statement revealed that her monthly pay varied from month to month.
64. On house allowance, it is submitted that it was not payable because under the *Regulation of Wages (General) Amendment Order* 2015, the daily rate of Kshs.550/= was inclusive of house allowance. The decision in *Julius Arisi & 90 others v Research International East Africa Limited* [2019] eKLR is relied upon to urge that daily and hourly rates prescribed by the regulation of wages orders are inclusive of house allowance.



Analysis and determination

65. The issues for determination are:
- i) Whether the claimant's employment was unfairly terminated or the claimant absconded duty;
 - ii) Whether the claimant is entitled to the reliefs sought.
66. On the 1st issue, parties have adopted diametrically opposed positions. While the claimant asserts that she was unlawfully terminated by word of mouth on June 14, 2012, the respondent urges that the claimant resigned from office and/or absconded duty.
67. While sections 41, 43, 44, 45 and 47(5) of the *Employment Act* provide for dismissal/termination of employment contract generally, both substantive and procedural precepts, the Act makes no express provision on desertion or absconding duty.
68. For a termination of employment to pass muster, the employer must demonstrate that it has a substantive justification and conducted the termination in accordance with a fair procedure. See *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR as well as the Court of Appeal decisions in *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR, *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR, as well as the *Standard Group Limited v Jenny Luesby* [2018] eKLR for the foregoing proposition.
69. On the other hand, the *Black's Law Dictionary* and decision in *Seabolo v Belgravia Hotel (supra)* and others are relied upon for the meaning of desertion. In the South African case, the Court expressed itself as follows:
- “... desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with the intention of not returning having left his or her post subsequently formulated the intention not to return”.
70. The court is also in agreement with the sentiments of Radido J. in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR on desertion and its prerequisites.
71. The claimant averred and testified that she was dismissed from employment on June 14, 2016 by word of mouth by the manager and denied having absconded duty. In her submissions, the claimant submits that her dismissal was in March 2007. It is unclear if this was a mistake. That after dismissal, the claimant left.
72. The respondent on the other hand averred and testified and submitted that the claimant absconded duty from May 11, 2016 when she refused to redo some work as requested by the Respondent's supervisor and did not return.
73. Attendance records produced by the respondent which the claimant contested in the submissions show that the claimant was not at work on June 14, 2016, the day her employment was allegedly terminated.
74. Although the respondent testified that it attempted to contact the claimant through one Evans Barasa Kuloba her alleged husband, it had no evidence to buttress the testimony. The respondent had the claimant's contacts including the sister's telephone number 0727 784 721 in the application form dated February 24, 2007, but did not use it.



75. It is unclear why the respondent relied on the alleged Mr. Evans Barasa Kuloba to communicate with the claimant as opposed to writing to her directly or calling her sister, the contract the claimant had provided.
76. Since the respondent had no evidence that the two were married, a fact the claimant denied, it beats logic why the respondent insisted on using Mr. Evans Barasa. They were employed in their individual capacities and none was the other's keeper.
77. The issue of presumption of marriage raised by the respondent appears to be off the mark in that even if the claimant was married to Evans Barasa, she was employed in an individual capacity and communication to her had to be personal not through a 3rd party. In fact, the respondent had no evidence that Mr. Evans Barasa was its employee in May or June 2016.
78. More significantly, the Respondent gave no ultimatum or notice to show cause or termination letter. It did not take the Claimant through a disciplinary hearing for having absconded duty.
79. If the Claimant was a casual employee as testified by RW1 and as submitted that her employment ended on the date she absconded duty, and the Respondent had no obligation to know her whereabouts, what was the absenteeism form produced by the Respondent allegedly signed by Mr. Evans Barasa for and why the purported attempts to get to her through Mr. Evans Barasa?
80. As the decisions in *Boniface Mwangi v B.O.M. Iyego Secondary School* [2019] eKLR, *Simon Mbiti Mbane v Inter Security Services Limited* [2018] eKLR, *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* (*supra*), *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR show, whenever, the employer alleges that the employee absconded duty, it must demonstrate that reasonable efforts were expended to ascertain the employees whereabouts to appreciate why he/she was not reporting to work. In addition, a notice to show cause is necessary to alert the employee that termination of their employment was under consideration on account of the desertion and a letter of termination ought to follow if the letter to show cause is not responded to.
81. In the instant case, the respondent had no evidence of how it attempted to contact the claimant, no phone calls to her or her sister whose contacts it had.
82. For these reasons, the court is satisfied that the respondent has in balance of probability failed to demonstrate that the Claimant absconded duty or deserted the work place.
83. Closely related to the submission that the Claimant absconded duty, is the submission that she had intimated that she would resign than redo the work as requested by the supervisor.
84. The respondent led no evidence to whom the alleged statement was made and led no evidence to reinforce the allegation of resignation.
85. It was the respondent's duty to document the alleged resignation as evidence of the separation.
86. Overall, the respondent led no evidence that the claimant resigned.
87. Finally, judicial authority is consistent that even in circumstances in which an employee had absconded duty, he/she is entitled to a fair disciplinary process prescribed by section 41 of the *Employment Act*. See *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR. In the instant case, the respondent led no evidence of any attempt to take the claimant through a disciplinary hearing.
88. In the final analysis, the court finds no evidence that the claimant absconded duty or was taken through a fair disciplinary process.



89. Further, it is the finding of the court that termination of the claimant's employment was unfair for want of procedurally propriety.

90. As to whether the claimant is entitled to her reliefs sought, the court proceeds as follows:

(a) Two months' pay in lieu of notice Kshs.29,571.40.

91. It is unclear how the monthly salary of the claimant was arrived at and why the claimant seeks two months' pay in lieu of notice. Having found that termination of the claimant's employment was procedurally flawed, the claimant is awarded one (1) month pay in lieu of notice.

92. For the avoidance of doubt, the monthly salary or wage payable shall be the averaged of the claimant's salary for the month of March and April 2016, Kshs.8,820/=.

(b) Unpaid Annual Leave for 9 years Kshs.133,071.30

93. Neither the written statement nor the memorandum of claim explains why the claimant did not proceed on annual leave for a single day in 9 years. The fact that the statement is silent on leave would seem to suggest that it was an afterthought although it was part of the demands made by letter dated November 16, 2016.

94. More importantly, the respondent led documentary evidence that the claimant was paid for leave at different times and the claimant allegedly signed the documents. The documents show that the claimant was paid Kshs.2,772/=, Kshs.1,648/= and Kshs.9,891/= in respect of leave records the respondent produced as exhibits.

95. Finally, the claimant made no specific submissions on leave as pleaded.

96. For the above reasons the prayer for unpaid leave is declined.

(c) House allowance for 9 years Kshs.159,685.56.

97. Although the claimant testified that her daily wage was Kshs.650/= paid weekly, on cross examination, she stated that the wage was either Kshs.650/= or Kshs.500/= per day and was unaware of the monthly salary relied upon in the memorandum of claim. The Respondent's witness on the other hand confirmed that the Claimant's daily wage was Kshs.550/=.

98. While the claimant made no specific submission on house allowance, the respondent submits that the same was unavailable to the Claimant because the daily wage prescribed by the Regulation of Wages (General) Amendments Order, 2015 of Kshs.550/= was inclusive of house allowance. This is the correct position.

99. The court is in agreement with the sentiments of Onyango J. in *Julius Arisi & 90 others v Research International East Africa Limited* [2019] eKLR where the Judge stated as follows:

“... However, under the Regulation of wages and conditions of Employment Act (General) Order, all hourly and daily rates of pay are inclusive of house allowance...”

100. For the foregoing reasons, the prayer for house allowance is declined.

(d) Service pay Kshs.133,071.30.

101. While the claimant's counsel submitted that the claimant was not a member of the NSSF because the NSSF statement on record was a “mere print out presented as a reactionary defence to the case” and



thus section 35(6) of the *Employment Act* did not apply to the Claimant, the Claimant confirmed on cross-examination that the employer used to make NSSF payments.

102. The Respondent submitted that since the Respondent remitted the Claimant's NSSF dues, she was a member of the organization and section 35(6) (d) of the *Employment Act* excluded her from service pay which as Rika J. observed in *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited* [2014] eKLR is only available to employees who are not covered under the different social security mechanisms enunciated under section 35 (6) of the Act. Granted that the claimant did not puncture the authenticity of the claimant's provisional NSSF statement dated January 5, 2017 which describes the Respondent as the employer, the document speaks for itself.

103. The claim for service pay is without merit and is dismissed.

(e) 12 months compensation for unfair/unlawful termination Kshs.177,428.40.

104. Having found that termination of the claimant's employment was unfair for want of procedural impropriety the claimant is entitled to the reliefs provided by section 49 (1)(c) of the *Employment Act*

105. In determining the quantum of compensation, the court has taken the following factors into consideration:

- (i) The claimant was an employee of the respondent for about 9 years.
- (ii) From the evidence on record, it is unclear whether the claimant wished to continue serving the respondent.
- (iii) The evidence on record shows that the claimant was not consistent in her attendance which is reflected in the amount paid per week.

106. In the circumstances, the court is satisfied that the equivalent of 5 months' pay is fair.

107. In conclusion, judgement is entered for the claimant against the respondent in the following terms:

- (a) One (1) month salary in lieu of notice Kshs.8,820
- (b) Equivalent of five (5) months' gross Pay Kshs.44,100
Total award Kshs.52,920
- (c) Certificate of service to be issued within 30 days.
- (d) Costs of this suit.
- (e) Interest at Court rates from the date hereof till payment in full.

108. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JUNE 2022

DR. JACOB GAKERI

JUDGE

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 has been guided by Article 159(2)(d) of constitution 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.

DR. JACOB GAKERI

JUDGE

