



**Wakhungu v Ital Build Imports Limited (Cause 1109 of 2016)
[2022] KEELRC 1272 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1272 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1109 OF 2016
MA ONYANGO, J
JULY 22, 2022**

BETWEEN

PATRICK ODUOR WAKHUNGU CLAIMANT

AND

ITAL BUILD IMPORTS LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated 16th May 2016, the Claimant avers that his employment was unfairly terminated by the Respondent. He seeks the following remedies:

- (a) A declaration that the Respondent's decision to dismiss the claimant was unlawful and unfair and that the claimant is entitled to payment of his terminal dues and compensatory damages.
- (b) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs.371,200/= as tabulated below:
 - (i) One month's salary in lieu of notice Kshs.24,000
 - (ii) Untaken/unpaid leave days for the entire period of service being

$$24,000 \times \frac{17}{12} \text{ years Kshs.34,000}$$
 - (iii) Unpaid salary for the 4 days worked between 2/09/2015 – 5/09/2015 being Kshs.800 x 4 days) Kshs.3,200



- iv. Service/gratuity calculated at 15 days salary between February 2014 – March 2015, service being $\frac{15}{30}$ x Kshs.24,000 x $\frac{11}{6}$ years 2013 Kshs.22,000
- v. 12 months' gross salary as compensation for unfair termination Kshs.288,000
- (c) Interest on (b) above from the date of filling suit till payment in full
- (d) Cost of this suit plus interest thereon.

2. The Respondent filed a response to the memorandum of claim dated 19th July 2016 in which it denied the averments of the Claimant. It specifically denies that the Claimant was its employee or that it terminated his services in the manner stated in the memorandum of claim.
3. On a without prejudice basis, the Respondent avers that if the Claimant was its employee, then he was employed on daily basis and is therefore not entitled to service pay.
4. At the hearing of the suit, the Claimant testified on his own behalf while the Respondent called two witnesses Edward Nyakwara Oyiende, RW1 and Larvine Sandra Winda, RW2. The parties thereafter filed and exchanged their written submissions.

Claimant's case

5. It was the Claimant's case that he was employed by the Respondent initially as a general worker and later as machine operator. He started work on 12th February 2014. As a general labourer he was paid Kshs.400/= daily while as a machine operator he was paid a daily wage of Kshs.800/=. Payment was made weekly.
6. The Claimant avers that on 5th September 2015, he reported on duty as usual and worked until close of day when he was called by the site agent and informed that he should not report to work until he received further communication. He testified that when he asked why the site manager responded that he would soon know why.
7. The Claimant testified that when he reported to work on 7th September 2015 at the site at Central Bank of Kenya (CBK) he was denied entry by the security staff. He made an inquiry from the store keeper who informed him that he would not be let in if his name was not in the wage list.
8. The Claimant denied that he was transferred to work at a site in Kilimani as alleged by the Respondent. He testified that the work at Kilimani had ended earlier and the workers there had been transferred to the site at Central Bank of Kenya (CBK).
9. He testified that at CBK he was asked why he did not report to work as usual. The Claimant testified that Mr. Karanja, the store keeper communicated with him and informed him that Mr Karanja did not know why he was stopped from working.
10. In his written submissions, the Claimant submits that the termination of his employment was unfair. That he was never served with a warning letter or taken through a disciplinary hearing as provided in Section 41 of the *Employment Act*.



11. It is submitted that the Respondent's witnesses stated he absconded duty yet there was no evidence that the Respondent tried to contact him. He submits that due process was not followed. For emphasis he relied on the cases of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR and *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. In all these three cases, the Court held that for termination of employment to be fair, the employer must prove both substantive and procedural fairness as provided in Sections 41 and 43 of the *Employment Act*.
12. The Claimant submits that the Respondent did not adduce any evidence in court to prove that it made efforts to reach the Claimant. The alleged absconding was never reported to the Labour officer and further, no muster roll was produced before Court to inform the days or period that the Claimant was absent from duty. He submits that there was no evidence filed to support the alleged calls made to him. No witness was called to substantiate the efforts that were made to reach the Claimant. Further, there was no show cause letter issued to the Claimant during the period he is alleged to have absconded duty.
13. For emphasis the Claimant relied on the decision in the case of *Simon Mbithi Mbane v Inter Security Services Limited* [2015] eKLR where the Judges stated that:

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
14. The Claimant further relied on the decision in *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR where the Court stated that:

"Dismissal on account of absconding/desertion must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such an employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties"
15. The Claimant urged the Court to decide the case in his favour.

Respondent's Case

16. It is the Respondent's case that the Claimant was employed to work at its building site at CBK in February 2014. In the month of September 2015, the CBK site experienced decrease in areas to be worked in. This led to staff idling which was against CBK regulations as CBK is always under strict security surveillance and for anyone to be allowed entry into the building they must produce a work permit specifying the location they were reporting to for duty.
17. It is the Respondent's case that they feared their workers would be turned away by CBK security for being idle. The site manager therefore discussed with the head office to allocate the idle staff to other sites until CBK released more areas to be worked in. A decision was made to transfer four (4) site staff, among them the Claimant, to another ongoing project. An email communication was sent to Kilimani site and Head Office to have the staff allocated work at Kilimani site. The Respondent produced the email as Respondent's Exhibit No. 1 attached to the witness statement of Mary Nyambura.
18. It is the Respondent's case that all the staff reported to the site at Kilimani except the Claimant. The Claimant was called by the site manager at CBK to ask why he did not report to Kilimani and he said he would report to CBK site once work resumed fully.
19. That after two weeks Cbk site opened up and the staff at Kilimani site were recalled. That all but the Claimant reported and continued with work. The Claimant could not be reached on phone and did



not report back. In view of the nature of work which was more or less casual, the Respondent assumed he had found work elsewhere and replaced him.

20. It was the Respondent's case that the Claimant was paid all his dues as is evident from Respondent's Exhibit No. 2 attached to witness affidavit of Mary Nyambura.
21. The Respondent denied that the Claimant was dismissed from work and prayed that the suit be dismissed.
22. In the Respondent's submissions it insists that the Claimant was not constructively dismissed. Counsel submitted at length on constructive dismissal relying on several authorities.
23. It is submitted that the Claimant absconded duty. Reliance is placed on the cases of *Joseph Nzioka v Smart Coatings Limited* (*supra*) and *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR wherein Nduma J. observed that:

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

24. The Respondent submits that it produced evidence that it made several attempts to reach the Claimant through his mobile number and through his colleagues unsuccessfully. That it did not write a show cause letter to the Claimant as it did not know his whereabouts.
25. The Respondent further relied on the decision in *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR where Court stated as follows;

“...Having failed to prove his claim of constructive dismissal, the Appellant could not benefit from the Respondent's failure to call witnesses...”

Analysis and Determination

26. Having considered the pleadings, evidence and submissions of the parties, the issues for determination are whether the Claimant absconded duty or was dismissed and whether he is entitled to the reliefs sought.
27. The Claimant testified that he was called on Friday 5th September 2015 and informed by the Site Agent not to report to work until he received communication. The Respondent's witnesses on the other had testified that the Claimant and his three colleagues were notified to report to another site of the Respondent in Kilimani as work at CBK site had reduced since CBK had not released space to be worked in.
28. The Respondent has produced correspondence at exhibit No. 1 as proof that the Claimant and three other workers were transferred to the Respondent's Kilimani sites. Below is an email dated 5th September 2015 from CBK Site (cbk.site@italbuildimports.com) copied to sandra.larvine@italbuildimports.com (RW2), under the subject: “REQUEST TO TEMPORARY ALLOCATE STAFF TO KILIMANI SITE” (sic)

“Dear Madam

The scope of work for our skilled and unskilled labour is minimal at the moment. I am thus requesting if it is possible we relocate the following casuals to Kilimani site and later absorb



them back when we start working on new areas, below are their names, job titles and period when they started working at the site;

1. Gordon Ouma Adoyo (Mason) – March 2015
2. Patrick Wakhungu Oduor (Operator) – February 2014
3. Gerald Muchoki Ngugi (General Staff) – July 2014
4. Job Kevin Alunga (General Staff) – January 2014

Kindly advice.

Kind regards,

Mary Maina”

29. The Respondent further issued an internal memo on the same date as reproduced below –

“Italbuild Imports Limited

CBK Site

5th September, 2015

Internal Memo

RE: TEMPORARY TRANSFER TO KILIMANI SITE

The following workers should report to Kilimani Site as from Monday, this is due to scope of work decline. Kindly note we will recall you back once we resume to work normally.

1. Patrick Wakhungu Oduor (Operator)
2. Gerald Muchoki Ngugi (General Staff)
3. Job Kevin Alunga (General Staff)
4. Gordon Ouma Adoyo (Mason)

Kind regards,

SIGN

Mary Maina

CBK Site Agent”

30. The Claimant testified that he was called by the site manager on 5th September 2015 and informed that there was no work for him at CBK site. He denied that he was transferred to Kilimani Site. From the above email and internal memo, it is evident that the Claimant was transferred to Kilimani Site together with three others who reported while the Claimant did not. I therefore find that the Claimant was not being truthful when he testified that he was not transferred to Kilimani Site and that work at Kilimani Site ended earlier than CBK and staff from Kilimani

Site sent to CBK site.

31. From the foregoing, I find that the Claimant was never terminated from work but failed to report to Kilimani Site where he had been instructed to report with his three colleagues, all of whom reported.



32. The issues about him not being issued with warnings or not being taken through a disciplinary hearing therefore do not arise, especially taking into account the nature of work which he was doing in a construction site where he was paid by the day. The [Regulation of Wages \(Building and Construction Industry\) Order](#) provides at paragraph 3 as follows –

3. Basic minimum wage

The basic wage to be paid to any employee shall not be less favourable than that specified, in relation to category of employee and to the area of employment, in the First Schedule:

Provided that—

- (a) an employee whose present daily or monthly wage is above that specified in the [Regulation of Wages \(Building and Construction Industry\) Order](#), 1998 (now revoked) shall be entitled to a wage increase of a rate not less than the difference between that wage and the amount specified in this Order;

[Emphasis added]

33. The First Schedule to the Order provides for basic minimum rate of wages per day, per shift and per month in recognition of the nature, of work in building and construction industry.

Whether the Claimant is entitled to the remedies sought

34. The Claimant prayed for payment of several heads of claim which I consider below:

(i) One month's salary in lieu of notice

35. Having found that the Claimant absconded duty, he is not entitled to notice or pay in lieu. This prayer is dismissed.

(ii) Untaken/unpaid leave days

36. The Respondent's witnesses admitted that the Claimant did not take leave. He is entitled to the same for the period worked being 12th February 2014 to 5th September 2015, a period of 18 months at the rate of 24 days per year or two days per month. (Refer to paragraph 8 of the Regulation of Wages (Building and Construction Industry) Order. I therefore award him 36 days at Kshs.800 per day which was his daily wage. I award the Claimant (800 x 36) Kshs.28,800/=.

(iii) Unpaid salary for four days

37. The Respondent having failed to prove that the Claimant was paid for the four days, I award him the same at Kshs.3,200/= as prayed.

(iv) Service gratuity

38. Paragraph 15 of the Order provides for gratuity as follows: 15. Retirement benefits and terminal benefits

- (1) On completion of four years' service with an employer, an employee shall be entitled to twenty days' pay for every completed year of service by way of gratuity to be based on the employee's wages at the time of termination of his service.
- (2) An employee who resigns for reasons, other than certified ill health or old age, or is dismissed summarily for any lawful cause, shall not be entitled to gratuity:



Provided that—

- (i) in the event of any dispute as regards resignation on medical grounds, the verdict of a qualified medical practitioner shall prevail;
- (ii) the normal retirement age shall be deemed to be that provided for in the *National Social Security Fund Act*.

39. The Claimant is thus not qualified to be paid gratuity for two reasons. First, he had not worked for four years. Secondly, he absconded duty.

(v) Compensation

40. The Claimant, having not proved that he was unfairly terminated, is not entitled to compensation.

Conclusion

41. In conclusion the Claimant is awarded the sum of Kshs.32,000/=.

42. The said sum shall attract interest at Court rates from date of judgment until payment in full.

43. The Claimant having not proved that his employment was unfairly terminated, he is not entitled to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF JULY 2022

MAUREEN ONYANGO

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 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.

MAUREEN ONYANGO

JUDGE

