



**Onyango v For You Clothing Limited (Cause 125 of 2017)
[2022] KEELRC 14685 (KLR) (19 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14685 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 125 OF 2017
HS WASILWA, J
JULY 19, 2022**

BETWEEN

ERASTUS OLIHETU ONYANGO CLAIMANT

AND

FOR YOU CLOTHING LIMITED RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 13th March, 2017 and filed in Court on 20th March, 2017, the Claimant sued the Respondent for alleged unfair termination and to be compensated for the unfair termination.
2. He prays for the following reliefs;
 - a. A declaration that the claimant's termination was unfair and compensation be awarded as provided under section 49 of the *Employment Act*.
 - b. Payment of Kshs 1,244,188 plus interest thereon at 14% p.a from the date of filling this suit until payment is made in full.
 - c. Costs of this suit plus interest.
3. The facts of this case is that the claimant was employed by the Respondent about 30 years ago as a sales man earning a gross salary of Kshs. 15,654 at the time of termination.
4. The claimant avers that on the 6th May, 2016, while at his workplace he was informed by the son to the Respondent's directors that he was seen on CCTV camera stealing from the store and since he was proceeding on leave he was informed that the issue was to be discussed once he returns from his leave.



5. Upon return from leave on the 3rd June, 2016, the claimant was informed by the director's wife that his services were no longer needed at the Respondent and after following up his employment status for a week, he confirmed that he had been dismissed.
6. The claimant contends that he was not informed of the reason for his termination neither was he subjected to disciplinary process as envisioned under the law. Also that he was not given certificate of service as such he was unable to secure his NSSF benefits.
7. The claimant avers that he used to report to work at 6am and clock out at 8am from Monday to Saturday and on Sunday from 10am to 6pm working overtime without being paid for the same.
8. The claimant prayed for payment of one-month salary in lieu of Notice, 12 months' salary compensation for the alleged unfair termination, one rest day pay for the 30 years worked, overtime pay and public holidays as calculated by the labour officer, unpaid leave for 2 years and gratuity for the 30 years worked.
9. The Respondent entered appearance on the 22nd March, 2017 and filed a response to claim on the 18th April, 2017 admitting to employing the claimant however that the employment began on 3rd January, 2014 as per the employment contract attached dated 3.1. 2014. Further that the Respondent was incorporated on the 9th December, 2000 as such it is not possible for the claimant to have worked for a non-existing company.
10. It is averred that the claimant did not carry out his duties diligently rather that he was issued with warning letters on various occasions and in May, 2016 he was involved in a theft incident which he confessed vide the confession letter dated 6th May, 2016 and promised not to repeat gain. The matter was latter reported to central police station and booked under Occurrence Book number 22/9/5/16.
11. The Respondent avers that the Claimant utilized all his leave days as seen in the muster Roll produced and with regard to off days, it was averred that the claimant utilized his off days and in fact the Respondent does not open any of its shops on Sunday as such the claimant was entitled to Sunday off day.
12. It was also stated that the claimant owes the Respondent Kshs. 54,220 which he borrowed. He confirmed that the Certificate of service will be issued upon clearance with it and payment of the said sum of money.
13. The Respondent avers that the claimant was not terminated from employment but that he deserted work on the 1st June, 2016 and a desertion letter was served upon him on the 9th June, 2016 which he never replied.
14. The Respondent prayed for the case herein to be dismissed with costs the Respondent.
15. This suit was heard on the 16th December, 2021 and on the 31st March, 2022.

Claimant's case

16. During hearing the claimant testified as CW-1 and told this Court that he was employed by the Respondent as a sales person and terminated on the 5th June, 2016 without any reason or disciplinary process. He testified that prior to his termination he never had any disciplinary issues neither was he ever served with any warning letter as alleged. He denied ever confessing to alleged theft and stated that he was never taken to the police.



17. The claimant further testified that he was employed in the year 2008 and affirmed that he was never served with the warning letter.
18. Upon cross examination by Gathu Advocate, the claimant testified that he worked for the Respondent from the year 2008 and denied ever signing he appointment letter of 2014. He testified that in the year 2016 there was an incident at the Respondent shop where a thief was caught on camera walking away with something in a bag. However that he did not know the thief neither did they work in cahoots with the thief. He also testified that he did not confess anything and the letter produced herein is doctored.
19. Upon further cross examination, the claimant testified that he went on leave after the incident and upon reporting back to work on 3.6.2016 only he was turned away as such he affirmed that he never absconded duty rather that he was dismissed by the Respondent. He further testified that he does not owe the Respondent any money and that he had never taken any loan with the Respondent. Finally, He confirmed that they never work on Sundays.

Respondent's case.

20. The Respondent's manager, Keyur Sumeie, testified as RW-1 and adopted his witness statement filed on the 3.7.2019. He testified that the claimant was employed in 2014 and terminated due to stealing. He avers that, the claimant was caught on CCTV camera and even confessed the said acts and sought for forgiveness. It was his testimony that the claimant took all his leave for the years worked as evidenced in the muster Roll. On overtime pay, it was averred that the same was paid and reflected in the claimant's payslips.
21. RW-1 continued to testify that they advanced the claimant a sum of Kshs.54,000 in the year 2015, which he signed for it but has not repaid to date. He added that they are ready to issue the claimant with Certificate of Service upon being paid the loan advanced to him. The witness testified that the claimant was not fired and the alleged wife of the director does no work at the Respondent neither does she have any authority to fire any employee as such the allegation that the claimant was fired is farfetched. The witness also testified that they do not open on public holidays as seen in the muster roll. Further that the claimant was a member of NSSF and NHIF as such not entitled to gratuity.
22. Upon cross examination by Gathecha Advocate, the witness testified that the claimant was summarily dismissed after refusing to heed to summons. He avers that the he is the one that personally called the claimant to go back to work. The witness maintained that the claimant confessed and the handwritten letter was drafted by the claimant himself and the handwriting and the signature are for the claimant. He also testified that the loan was deducted from his salary however the payslips did not show progress of the loan paid.
23. The Respondent called a second witness, Cop. Jackson Konge, a police officer attached to Nakuru police station. This witness testified that the theft issue was reported to them on the 6.5.2016 and OB issued on facts that the claimant Erastus Onyango was caught on CCTV Camera giving a stranger a black suit, that the claimant confessed on this act and sought for forgiveness. The witness avers that he did not carry out the investigation as the person assigned this case was Officer Ombaye who was not available to give testimony and added that he does not know the current position of the case.
24. Upon cross examination by Gathecha Advocate, the witness testified that he did not know if criminal charges were preferred against the claimant and that his only duty was to produce the O.B.



Claimants' Submissions.

25. The gist of the claimant submissions is that the claimant was unfairly terminated when he reported back to work from leave only to be informed that his services were no longer required without being given reason for the termination or being subjected to disciplinary process as envisaged under the Employment Act. The claimant prayed for the claim to be allowed as prayed. To support his case, the claimant cited the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR where the Court held that;

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

26. The claimant submitted that he has proved his case as against the Respondent and the Respondent have failed to rebut it as provided for under section 47(5) of the Employment Act, hence, the Court ought to allow the claim as prayed.

Respondent's Submissions

27. The Respondent submitted from the onset that the claimant was employed in January, 2014 and not 30 years as pleaded or 2008 as per the claimant testimony. It was argued that the evidence of employment is in the letter of employment dated 3.1.2014 which was signed by the Claimant. Further that the Respondent was incorporated in 2000 as such the claimant could not have worked for the Respondent for the 30 years. It was also submitted that the claimant's allegation that he was employed either for the 30 year or in 2008 as alleged was not proved as provided for under section 107 of the Evidence Act. To support this argument the Respondent relied on the case of Joyce Njuguna V P.N Mashru Limited [2019] eklr.

28. On the theft occasioned by the claimant, it was submitted that the issue was captured on CCTV cameras which after viewing, the claimant admitted to it and sought for forgiveness. Further that the incident was reported to the police who also testified in this case and the claimant having been implicated did not try to rebut the said allegation in terms of witnesses such as fellow employees and as such the act was affirmed. The act of stealing amounts to gross misconduct as per section 44(4) of the Employment Act and a recipe for dismissal.

29. The Respondent argued that the claimant was not dismissed as alleged rather that he absconded duty when he proceeded for his leave and failed to report back to work despite being summoned and issued with a desertion notice as such the termination was occasioned by his desertion and not termination as purported. To support its case, the Respondent relied on the case of Felistas Acheba Ikatwa V Charles Peter Otieno [2018] eklr

30. On the reliefs sought, it was submitted with regard to leave days that the muster roll illustrates that the claimant utilized all his leave days. On the overtime pay sought, it was submitted that the claimant's hours worked is indicated in the muster roll and any overtime pay is captured in the payslips produced.



Further that the claimant never worked on public holidays as seen in the muster roll as such is not deserving of that relief.

31. In conclusion the Respondent submitted that they have demonstrated that the claimant absconded duty and was not terminated, therefore is not entitled to the reliefs sought.
32. Having considered the evidence and submissions of the parties herein, the issues for this court's determination are as follows;
 1. Whether there were valid reasons to warrant claimant's termination.
 2. Whether the claimant was accorded due process.
 3. Whether the counterclaim is proved.
 4. Whether the claimant is entitled to the remedies sought.

Issue No. 1

33. On this issue the respondents aver that the claimant absconded duty.
34. The respondents indicate that the claimant absconded duty after a theft incident where the claimant was caught on CCTV Camera stealing from the respondent's shop.
35. The incident was then reported to the police under OB issued on 6/5/2016.
36. The claimant denied absconding duty and even the theft issue. He also denied writing a letter admitting to theft.
37. He indicated that the letter allegedly written by him is not in his hand.
38. Indeed the issue of whether the claimant was dismissed for theft was recanted by the claimant's witness No. 1 who indicated that the claimant absconded duty.
39. He indicated that he tried to summon claimant back to work but the claimant refused to go back.
40. There is no indication that the respondents wrote any letter to the claimant summoning him back to work when the claimant had allegedly absconded duty.
41. The respondents had issued claimant an appointment letter (which he denied) through no known address but his telephone number was known.
42. There is no call data submitted or text messages sent to him to show he was required on duty. The idea then that the claimant absconded duty was not proved and I disregard it.
43. It was the respondent to prove the validity of reasons for the termination of the claimant but I find that this obligation was not discharged by the respondents.

Issue No. 2

44. Indeed Section 41 of the *Employment Act* 2007 states as follows;

“41.

Notification and hearing before termination on grounds of misconduct

Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and



the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

45. Ever if the claimant had absconded duty, he was still entitled to a fair hearing on grounds of absenteeism. No such disciplinary process ever occurred. If it was the respondents contention that the claimant had stolen, there is also no indication that he was taken through disciplinary process even for this.
46. I therefore find that the claimant was dismissed without due process and without establishing the validity of valid reasons leading to the dismissal. I therefore find the claimants dismissal unfair and unjustified.

Issue No. 3 Counter Claim

47. The respondent’s counter claimed against the claimant for a purported loan advanced to the claimant.
48. There is no evidence however adduced by the respondent that this loan was advanced to the claimant.
49. There was no any evidence that the same was even deducted from the claimant’s salary from his payslips.
50. My finding is that the respondents failed to prove their counter claim and the same is dismissed accordingly.

Issue No. 4 Remedies

51. Having found the claimants dismissal unfair and unjustified, I find for him as follows;
 1. 1 month’s salary in lieu of notice = 15,654/=
 2. 10 month’s salary as compensation for the unfair and unjust dismissal = 10 x 15,654 = 156,540/=Total = 172,194
Less statutory deductions
 3. Since claimant was a member of NSSF, prayer for gratuity/service pay is not payable and is dismissed.
 4. Claim for overtime and rent/holiday pay is also not proved.
 5. The claimant be issued with a Certificate of Service.



6. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF JULY, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyabuto holding brief for Gathecha for the claimant – present

Githiru for respondent – present

Court assistant – Fred

