



**Kimani & another v Tridimensional Services Limited (Cause
1285 of 2017) [2022] KEELRC 3805 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3805 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1285 OF 2017
SC RUTTO, J
JULY 15, 2022**

BETWEEN

WILSON NJENGA KIMANI 1ST CLAIMANT

NASHON MUNGASIA BERU 2ND CLAIMANT

AND

TRIDIMENSIONAL SERVICES LIMITED RESPONDENT

JUDGMENT

1. The claimants aver that they were employed by the respondent as technicians on a monthly salary of Kshs 64,818/= That the 1st claimant was employed on probationary terms on June 10, 2012 and his employment was confirmed on September 18, 2012, whereas the 2nd claimant was employed on probationary terms on September 10, 2013 and his employment was confirmed on December 10, 2013. The claimants further aver that they served the respondent diligently until January 31, 2017 when they were summarily dismissed on grounds that they absconded duty.
2. According to the claimants, their dismissal was substantively and procedurally unfair. Consequently, the claimants seek compensatory damages for unlawful termination, notice pay, salary for the month of January, 2017, untaken leave days, overtime wages for excess hours worked per week and wages for days worked on rest days and public holidays.
3. The claim was opposed through a response filed on May 13, 2019, and through which the respondent denies that the claimants served diligently. The respondent avers that the claimants absconded duty and despite its attempts to get in touch with them to return to work and explain their reasons for absconding duty, they refused and or neglected to do so. As a result, the respondent had no choice but to terminate the employment of the claimants. To this end, the respondent termed the reliefs sought by the claimants as untenable and unfounded hence it urged the Court to dismiss the claim with costs.
4. The matter proceeded for trial on March 14, 2022 when each side called oral evidence.



1st Claimant's Case

5. The 1st claimant was the first to testify. At the outset, he adopted his witness statement and documents filed in support of his claim, to constitute part of his evidence in chief. The said documents were also produced as his exhibits before court.
6. The 1st claimant who testified as CW1, told court that he did not abscond duty as alleged in his letter of summary dismissal. He further testified that he was not given an opportunity to defend himself. CW1 further testified that after their termination, the respondent called them with a view to discussing the issue of salary and which it maintained, could only afford to pay Kshs 70,000/= . In further testimony, he stated that at the time of his termination, he had a motor vehicle which belonged to the respondent and as a result, he was arrested and booked at Embakasi police station, hence the reason he texted Mr Leonardo of the respondent company, on February 10, 2017.
7. He further stated that he had left employment as they had not agreed on the issue of salary with the respondent.
8. It was his further testimony that he was forced to work from 8:00 am to 11:00 pm throughout the week including public holidays without any rest day per week. That further, he was not allowed to proceed on leave except in 2016.

2nd Claimant's Case

9. The 2nd claimant testified as CW2 and at the outset, also sought to adopt his witness statement and documents filed on his behalf, to constitute part of his evidence in chief. The said documents were also produced as his exhibits before court. Just like CW1, he denied absconding duty and stated that the respondent did not inform him of its intention to dismiss him. That further, he was not given a chance to be heard in the presence of another employee or shop floor union representative. It was his testimony that he only met with the respondent after he had already been terminated. That when they met with Mr Leonardo from the respondent company, he told them that he would increase their salary to Kshs 70,000/= if they resumed work but they didn't agree.
10. CW2 also stated that he was forced to work from 8:00 am to 11:00 pm throughout the week including public holidays without any rest day per week. That he was also not allowed to proceed on leave except in 2016.

Respondent's Case

11. The respondent called oral evidence through Mr Leonardo Dolciami who testified as RW1. He identified himself as a Director of the respondent company. RW1 adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute his evidence in chief. RW1 testified that every year, the respondent closes down for Christmas between 20th December, until 5th January, the following year. That in 2017, when the respondent reopened after the Christmas break, the claimants refused to resume work.
12. That the claimants were contacted and asked to resume work but they refused to do so. That following the abscondment of duty by the claimants, the respondent had no option but to them with letters of termination. It was his further testimony that the claimants stole one of their clients, NextGen Mall. That further, the claimants refused to return the respondent's motor vehicle which was in their possession, hence they had to involve the police. RW1 further denied the claimants' assertion that they worked overtime. He further reiterated that all staff of the respondent take leave between 20th



December until 5th January, the following year, during which period the company closes for Christmas. That as such, the claimants utilized their leave during this period. In further testimony, RW1 stated that there was no evidence that the claimants applied for leave and the same was denied.

Submissions

13. It was the claimants' submissions that the respondent did not demonstrate that it attempted to reach them so as to enquire the reason for their alleged absence from work. That as such, the reason for their dismissal was not fair and valid. The claimants placed reliance on the case of *Boniface Francis Mwangi v BOM Iyego Secondary School* [2019] eKLR. It was further submitted on behalf of the claimants that they were not issued with any notice nor subjected to a disciplinary hearing on account of abscondment of duty. That in this regard, their dismissal was unfair both substantively and procedurally.
14. The respondent did not file any submissions as the same were not traceable either on record or on the online platform. This is despite them being granted an opportunity to do so.

Analysis And Determination

15. Upon considering the pleadings on record as well as the evidentiary material placed before me, the issues falling for the court's determination can be distilled as follows: -
 - a. Whether the claimants absconded duty?
 - b. Whether the claimants were subjected to fair procedure prior to being dismissed from employment?
 - c. Are the claimants entitled to the reliefs sought?

Whether The Claimants Absconded Duty?

16. The respondent maintains that the claimants absconded duty hence the reason for their termination. On the other hand, the claimants have denied absconding duty and assert that they were unlawfully terminated from employment.
17. It is notable from the claimants' letters of dismissal that they were dismissed for abscondment of duty.
18. To support its assertion that the claimants absconded duty, the respondent exhibited text messages exchanged between RW1 and the 1st claimant on February 10, 2017. In the said text message, the 1st claimant addresses RW1 as follows: -

“Hi. Mr Leo we left working because we never agreed on salary issue thus that does not mean now we are enemies anyway I have yr vehicle with me you gave us bt now I would like to buy it.” Underlined for emphasis

19. In response to the 1st claimant's message, RW1 stated as follows: -

“Hi Wilson I have seen your message and I do not have anything else to add. I do not have any enemy and I do not understand why you say so. About the car at the moment we do not sell any company asset if we will in future will let you know. So as for now just return the car since you have decided not to work with us and the car is a company asset. Hope will collaborate again in future tnks. Leonardo.”

20. Further, during the trial, CW1 testified that they met with RW1 after their dismissal and he persuaded them to resume work. It was his further testimony that could not agree with the respondent on the



issue of salary as they wanted to be paid Kshs 100,000/= whereas the respondent was only willing to pay them Kshs 70,000/=.

21. In his testimony in chief, CW2 stated that together with CW1 and a Mr Kennedy, they met with RW1 who told them that he would increase their salary to Kshs 70,000/= if they resumed work, but they did not agree. That its only the said Mr Kennedy who agreed to resume work.
22. The foregoing set of circumstances lend credence to the respondent's assertion that the claimants absconded work. Indeed, by their own admission, they left the respondent's employment on account of disagreement as regards the salary payable. They also admitted that RW1 persuaded them to resume work after they had been terminated but they refused to do so on account of the salary issue.
23. Subsequently and despite their denial, it is evident that the claimants indeed absconded duty thus giving the respondent a reason to commence disciplinary action against them.
24. Accordingly, the respondent had justifiable cause to terminate the claimants' employment on account of abscondment of duty, which notably, is a ground for dismissal under section 44 (4) (a) of the Act.

Whether the claimants were subjected to a fair procedure prior to being dismissed from employment?

25. Procedural fairness is stipulated under sections 45 (2)(c) and 41 of the Employment Act. It requires an employer to notify an employee of the reasons it is considering terminating his or her services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.
26. Section 41 (2) of the Employment Act is relevant in this case as it relates to summary dismissal. It provides as follows: -

“[(2) 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.” Underlined for emphasis
27. In the instant case, the claimants contend that they were not subjected to a fair process as they were never required to explain their absence from work.
28. From what is apparent, the claimants were terminated upon the respondent noting their absence from work. As it is, there is no evidence of communication from the respondent's end to the claimants, prior to their dismissal from employment. Despite the respondent's assertions that they had unsuccessfully tried to contact the claimants to resume work hence its decision to terminate them for abscondment of duty, there was no evidence to that effect.
29. It is also apparent that the parties only met after the claimants had been dismissed from employment.
30. It is also evident that the respondent had means of reaching the claimants, seeing that it was able to serve them with their letters of summary dismissal. There was therefore no reason why it could not use similar means to reach out to the claimants and ask them to explain their absence from work prior to being summarily dismissed.
31. The claimants' failure to report to work, gave the respondent the right as an employer, to commence disciplinary action against them. However, this had to be done procedurally and the respondent was duty bound to comply with all the legal requirements which entailed notifying the claimants of the reasons it was considering terminating their employment in a language they understood.



32. The respondent did not tender any evidence before court to prove that it indeed issued a notification to the claimants to that effect or accorded them a hearing.
33. The total sum of the foregoing is that the respondent ought to have granted the claimants an opportunity to defend themselves or rather give their side of the story.
34. In view of the foregoing, it is apparent that despite the fact that the respondent had justifiable cause to terminate the claimants, it did not comply with the statutory provisions constituting procedural fairness.
35. Evidently, the respondent did not follow the mandatory procedure as by law required, hence it is at fault for non-compliance. In the end, the claimants' termination though with reason, was not procedurally fair.
36. Having so found, what then are the reliefs available to the claimants?

Reliefs

One Month's Salary In Lieu Of Notice

37. As I have found that the claimants were not terminated in line with fair procedure, I will award each of them one (1) month's salary in lieu of notice.

Compensatory Damages

38. As demonstrated herein, the claimants clearly absconded duty and refused to resume work despite being persuaded to do so by the respondent after their dismissal. Their bone of contention being disagreement of salary. Section 49 (4) of the [Employment Act](#) enjoins this court to take into account certain considerations in making an award thereunder. Such considerations include the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination.
39. In the instant case, the claimants largely contributed to their dismissal from employment as they left work on their own volition and refused to report back even after termination. In the circumstances, it would not be prudent to award the claimants compensatory damages noting their contribution to their termination from employment. As such, I decline to award the claimants compensatory damages as prayed.

Salary for January, 2017

40. From the evidence presented before court, the claimants absconded duty from January 7, 2017 hence they are only entitled to salary for 7 days. There is no evidence that the claimants worked for the entire month in January 2017 hence they are not entitled to full salary. The respondent exhibited a tabulation of the claimants' terminal dues which included salary for the said 7 days. As such, they are entitled to the same in the event they are yet to be paid.



Unpaid Leave Days, Public Holidays, Rest Days And Overtime Worked

41. These claims are denied as they have not been proved. On this issue, I will echo the determination in the case of *Rogoli Ole Manadiagi v General Cargo Services Limited* [2016] eKLR, where the court expressed itself as follows: -

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

42. As such, it was incumbent upon the claimants to prove entitlement to these reliefs but having failed to do so, the claim to this extent fails.

Certificate of service

43. The employment relationship having been admitted, the claimants are entitled to a certificate of service pursuant to section 51(1) of the *Employment Act*.

Orders

44. In the final analysis, the claimants are awarded as follows: -

1st claimant

- a. 1 month salary in lieu of notice.....Kshs 64,818.00
 - b. Salary for 7 days in January, 2017.....Kshs 15,127.00
- Total Kshs 79,945.00

2nd claimant

- a. 1 month salary in lieu of notice.....Kshs 64,818.00
 - b. Salary for 7 days in January, 2017.....Kshs 15,127.00
- Total Kshs 79,945.00

45. The awards will be subject to interest at court rates from the date of judgment until payment in full.

46. As the claim has only succeeded on grounds that the procedure of termination was not complied with, I will order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY 2022.

STELLA RUTTO

JUDGE

Appearance:

For the claimants Mr Malonza



For the respondent Mr Omino

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 March 15, 2020 and subsequent directions of April 21, 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

