



**Were v DHL Exel Supply Chain (K) Ltd (Cause 1759 of 2017)  
[2022] KEELRC 1278 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1278 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1759 OF 2017**

**SC RUTTO, J  
JULY 8, 2022**

**BETWEEN**

**JOHN OWINO WERE ..... CLAIMANT**

**AND**

**DHL EXEL SUPPLY CHAIN (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers through his amended memorandum of claim that he was employed by the respondent, as a general labourer with effect from 10<sup>th</sup> September, 2011 and that his duties entailed loading and offloading trucks. That he worked continuously with diligence and to the satisfaction of the respondent. He claims that he was terminated by the respondent without being given any reason or justification hence he perceives the termination as unfair and unlawful. Consequently, he seeks against the respondent notice pay, unpaid overtime, payment of untaken leave days, unpaid house allowance and compensatory damages.
2. Through its response to the memorandum of claim, the respondent denied that the claimant was employed as a permanent employee. The respondent further averred that the claimant assaulted a workmate and upon being asked to show cause why disciplinary action should not be taken against him, he absconded duty. That as such, the claimant's contract of employment as a casual labourer, was terminated.
3. On 11<sup>th</sup> November, 2021, when the matter came up for mention, both parties took a mutual hearing date for 28<sup>th</sup> March, 2022. On the date of the hearing, the respondent was absent from Court, hence the file was placed aside to allow the claimant's advocate to contact the respondent's advocate. The claimant's advocate reported back to Court, 20 minutes later and stated that the respondent's advocates on record, M/S Shapley Barret & Company Advocates, had indicated that they were no longer representing the respondent.



4. In the circumstances, and noting that the hearing date was taken mutually, the Court directed that the matter proceeds for hearing, the respondent's absence notwithstanding.

#### **Claimant's case**

5. The claimant testified in support of his case and at the outset, he sought to adopt his amended memorandum of claim and amended witness statement, to constitute part of his evidence in chief. The documents filed with the initial claim were also produced as the claimant's exhibits.
6. The claimant testified that he was employed by the respondent with effect from 10<sup>th</sup> September, 2011 and worked continuously for a cumulative period of four years and seven months. That on 2<sup>nd</sup> May, 2016, as he was offloading bottles from a truck, one fell accidentally and landed on one of his colleagues, by the name Mr. Mutende. That the said Mr. Mutende took the bottle to his supervisor and stated that the claimant had hit him with the same.
7. He stated in further testimony that both of them were required to record statements and thereafter, he was suspended from duty verbally. That he was not given any notice to show cause nor subjected to a disciplinary hearing. He further denied deserting duty. He further stated that when he went back to work, the supervisor refused to see him. He told Court that his termination was unfair.

#### **Submissions**

8. It was the claimant's submission that he worked continuously for about four years seven months and that there was no evidence by the respondent that there was a break in his employment. That his employment was therefore converted automatically to permanent terms. It was further submitted that the claimant was neither given any valid reasons as to his termination nor a chance to be heard prior to his termination. That the fairness test was never achieved and there was no substantive justification for the respondent to terminate the claimant's employment. To support his position, the claimant cited the case of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR and *Kenya Union of Domestic Hotels Educational Institutions & Hospitals Workers vs Mombasa Sports Club* Cause No 440 of 2013.

#### **Analysis and determination**

9. From the pleadings, the evidence presented and the submission on record, it is evident that the following issues fall for the Court's determination: -
  - a) On what terms was the claimant engaged?
  - b) Whether the claimant's termination was fair and lawful?
  - c) Whether the claimant is entitled to the reliefs sought?

#### **On what terms was the claimant engaged?**

10. The respondent states in its response that the claimant was engaged casually and worked seasonally whenever his services were required. On the other hand, the claimant avers that he worked for the respondent continuously for four years, seven months.
11. Section 2 of the *Employment Act*, 2007 defines a casual employee to mean,

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”



12. Ideally, a casual employee is paid at the end of the day or at times, at the end of the week. Further, a casual employee's engagement terminates at the end of each day and he or she is not obliged to show up at work on the subsequent day, if he or she does not wish to do so.
13. The respondent exhibited a letter of summary dismissal dated 14<sup>th</sup> May, 2016 which gives the reasons for the claimant's dismissal as being abscondment of duty.
14. Section 35 of the *Employment Act* provides as follows: -
 

“A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—  
 where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;”
15. The import of the foregoing provision is that a casual employee's contract of service is terminable without notice. It is therefore odd that the respondent would terminate the claimant's employment since a casual employee works intermittently hence if he or she fails to show up for work, an employer need not terminate his or her work formally but rather, proceed to engage another employee. As such, the issue of abscondment of duty does not arise at all.
16. The context of the employment relationship presenting herein does not seem to have been casual at all. Otherwise the respondent would not have deemed it fit to issue the claimant with a letter of summary dismissal and cite him for abscondment of duty.
17. In light of the foregoing, it is apparent that the parties were in an employment relationship that was so structured and devoid of the ingredients that would ordinarily exist in a casual employment.
18. Therefore, the claimant was entitled to the safeguards available to an employee on a regular term employment and this included being given reasons prior to being terminated and being subjected to a fair process.

**Whether the claimant's termination was unfair and unlawful?**

19. The claimant has alleged that his termination was unlawful and unfair, as he was not given any reasons for the same. Through its response to the memorandum of claim, the respondent stated that the claimant was summarily dismissed for absenting himself from work.
20. Pursuant to section 43(1) of the *Employment Act* (Act), an employer is required to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. In addition, section 45 (2) of *the Act* provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
21. The burden of proof in that regard, rests with the employer. What this means is that the respondent was required to prove that the claimant indeed absented himself from work.
22. In this case, the respondent failed to present evidence to prove that the claimant absconded duty. There was no muster roll or work attendance register to prove the claimant's absence from work. Coupled with the foregoing, the respondent's witnesses did not attend Court to tender oral evidence. To this end, the witness statement of Mr. Philip Kaesa was untested during the trial, hence did not carry the same weight, as the oral evidence of the claimant. In the premises, the claimant's account carries the day.



23. It is therefore clear that the reasons for the claimant's dismissal were not proved by the respondent as required under sections 43(1) and 45(2) of the Act hence cannot be determined to be fair and valid.
24. Beyond proving reasons for an employee's termination, an employer is required under section 45(2)(c) of the Act to subject an employee to a fair process prior to termination. The specific requirements of a fair hearing are provided for under section 41 of the Act. In this regard, the procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations in the presence of a union representative or an employee of own choice.
25. The respondent states in its response that the claimant was issued with a notice to show cause dated 2<sup>nd</sup> May, 2016. It is notable that as per the show cause letter annexed to the response to the claim, the claimant was being asked to respond to the allegations of assault against his coworker.
26. As it is, there is no evidence on record to prove that the claimant was required to respond to the allegations of abscondment of duty. If indeed, the claimant absconded duty from 2<sup>nd</sup> May, 2016 as alleged, then nothing stopped the respondent from asking him to explain the said absence.
27. In addition, there was no evidence that following the claimant's abscondment of duty, the respondent made effort to establish his whereabouts and require him to explain his absence.
28. In the case of Mary Mumbi Kariuki vs Director, Pamoja Women Development Programme [2015] eKLR the Court found as follows: -
 

“...In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

[24]. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.”
29. I reiterate the findings in the above case and apply the same herein. The fact that there was no evidence that the respondent contacted the claimant upon noting his absence casts doubt as to his alleged abscondment from duty.
30. It is also notable that the provisions of section 41 of the Act are mandatory. This was the determination by the Court of Appeal in the case of Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR.
31. What is apparent from the facts and evidence before me, is that the claimant was not subjected to a fair process prior to being terminated from employment. One wonders why the respondent could not issue the claimant with a letter similar to that it alleges to have issued him on 2<sup>nd</sup> May, 2016, asking him to explain his absence from work.
32. The total sum of the foregoing, is that the respondent did not prove that there was a valid and fair reason for the claimant's dismissal and that he was subjected to a fair hearing prior to dismissal. The net effect thereof, is that the claimant's dismissal was unfair and unlawful in terms of section 45 of the Act.

### **Reliefs**

33. On account of the fact that the claimant's termination was unfair and unlawful, he is awarded one month's salary in lieu of notice.



34. As I have found that the claimant's dismissal was unfair, he is awarded six (6) month's salary as compensatory damages. This award is informed by the length of the employment relationship and the fact that the respondent did not prove the reasons for the claimant's dismissal nor subject him to a fair process.
35. The claim for overtime and untaken leave days is declined as the same was not particularized and proved. In this regard, I align myself to the holding in the case of *Rogoli Ole Manadiegi vs 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...”
36. The claimant has prayed for house allowance in the sum of Kshs 180,000/=. It is notable that the pay slips exhibited by the claimant provided for his salary in gross. The Black's law dictionary, 10<sup>th</sup> Edition defines gross income as the “Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings.”
37. From the above definition it is presumable that the term gross infers that all income payable has been taken into account. Further, in the case of *Samson Omechi Ongera vs Tusker Mattresses Limited* [2018] eKLR, the court found that: -
- “Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime.”
38. In the circumstances, the court arrives at a similar finding and makes a determination that the claimant's gross salary was inclusive of house allowance, hence the prayer in that respect is denied.

### Orders

39. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded: -
- (a) Compensatory damages equivalent to six (6) months' gross salary being Kshs 104,436.00.
  - (b) One (1) month's salary in lieu of notice, being the sum of Kshs 17,406.00.
  - (c) The total award is Kshs.121,842.00
  - (d) Interest on the amount in (c) at Court rates from the date of Judgment until payment in full.
  - (e) The respondent shall also bear the costs of this claim.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF JULY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**



**Appearance:**

For the Claimant Ms. Alividsa

For the Respondent No appearance

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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**