



**Mariita v Leading Locks & Access System (Cause 2407 of 2017)
[2022] KEELRC 1194 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1194 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2407 OF 2017
AN MWAURE, J
JULY 7, 2022**

BETWEEN

GEORGE ONGERA MARIITA CLAIMANT

AND

LEADING LOCKS & ACCESS SYSTEM RESPONDENT

JUDGMENT

1. By the statement of claim dated the 30th day of November 2017, the Claimant seeks the following remedies from Court;
 - a. A declaration that the Claimant’s termination from his employment was unfair and unlawful
 - b. The Claimant be paid his terminal benefits as set out in paragraph 12 hereinabove amounting to Kshs 1,378,863.18/=
 - c. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice
 - d. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of section 51 of the Employment Act, 2007.
 - e. The Respondent to pay the costs of the claim
 - f. Interests on the above at Court rates.

Claimant’s Evidence

2. The Claimant claims that he was offered employment as a driver/electrician at a basic salary of Ksh 25,000/= per month exclusive of house allowance. The employment contract was done orally and was



never reduced to writing by the Respondent in contravention of section 9 of the Employment Act, 2007.

3. The Claimant says he worked for the Respondent with due diligence and faithfulness until on or about 5th April, 2017 when the Respondent unfairly and unlawfully terminated the Claimant's employment without any valid reason.
4. The Respondent terminated the Claimant's employment without giving him any notice or inviting him to show cause why his services should not be terminated contrary to the principles of natural justice and the provisions of section 41 of the Employment Act, 2007.
5. The Respondent refused to pay the Claimant his dues and as a result the Claimant instructed his advocates on record who wrote a demand letter to the Respondent seeking payment of his terminal dues.
6. The Claimant used to work for extra hours and was not paid any amount for the extra time he worked for the Respondent. The Claimant used to report for work at 8.30 am and used to leave at 5.30 pm. The Claimant worked during public holidays but was not paid any amount of money for working during public holidays and therefore seeks payment.
7. Claimant also says he worked for the Respondent in May, June and July 2017 and was not paid for working in those months and therefore seeks payment of his salary for the 3 months he worked.

Respondent's Evidence

8. The Respondent entered an appearance on the 11th January 2018 through the firm of Ogola Okello & Co Advocates. The Respondent says that the Claimant's work was characterized by acts of insubordination, carelessness and drunkenness at work. The Claimant absconded duties and was terminated by the operation of the law when he demanded payment of his terminal dues thereby evincing his intention not to return to the Respondent's place of work.
9. The Respondent says the claims for salary in lieu of notice is unfounded as the Claimant absconded work and his duties. The Claimant used to be given a house allowance of ksh 3,428/= The claim for overtime and public holidays worked is unjustified, unfounded and total fabrication of figures meant to extort the Respondent. The 12 months' salary compensation is unjustified considering the level of insubordination, intoxication, absenteeism and unprofessionalism the Claimant had during working hours. The Respondent prays that the claim be dismissed with costs.

Claimant's Evidence in Court

10. Claimant witness George Ongera Mariita gave sworn testimony and said he was employed by the Respondent as a driver in the year 2006 in February. He was earning Kshs 15,000/= and was increased to Kshs 25,000/= per month. He used to get consolidated salary. He used to work from 8.00 am to 5:30 pm
11. He adopted the witness statement dated 30/11/2017 as his evidence in chief as well as the list of documents which he adopted as his exhibits. He says his employment was terminated in 2016 in May. He was told to take a car for service and then got a call from Odhiambo the owner of the Company. He was told to go away. The said Odhiambo told him he never wanted to see him again.
12. He was not given any notice and was not invited to a disciplinary hearing. He was accused of being disobedient and going to work when drunk and was also accused of insubordination. He says he never got a warning letter. He prays that the Court award his prayers as in his claim being ksh 1,378,863.18/



= and costs. He also says he never got his certificate of service and he worked for the Respondent for 10 years.

13. Upon cross-examination, he said that he never used to get paid for overtime. He says his salary was initially paid in cash but was later paid through the bank. The Claimant says that on the 27/2/2016 he took vehicle to the garage and then he returned the car to office. He states that brakes failed and hit another car. He was taken to Court and his people sold land and paid for the cash bail and he was released. He was accused of causing the accident. He was told to go home in May 2016. He can't remember if he got his salary in April 2016 but did not get the salary for May 2016.
14. Further he says he was never given notice when he was terminated and he never got any warning letter. He said he did not write the letter dated July 2008 and did not know how to write.
15. Upon re-examination, he said that he was not terminated because of causing accident. He was dismissed but was not told it was because of the accident. He claims that the letter of apology is not his and he does not even know how to write.

Respondent's evidence in Court

16. Respondent witness Walter Odhiambo Otieno said that he is the director of the Respondent. He adopted his statement dated the 15/3/2022 as his evidence in chief. He also produced his list of documents as exhibits in the case. He confirms that the Claimant was their employee. He says that on 27th February 2016 he was at home in Siaya and got information that their car which they had taken to the garage near city stadium needed to be picked.
17. The Claimant was given money to go for the car. The Respondent's evidence is that by 10 am he had been given the car. He never came to work and by 1 pm the witness was called and told that the Claimant was not receiving calls. He tried in vain to call the Claimant. In the evening he was told that his car had crashed at Adams Arcade, ten metres from the office. He called their accountant to go and check what happened.
18. They went to the police station and found George, the Claimant was at the Police Station. He was still drunk on that day. He says he is not sure if the Claimant was taken to Court. He says the Claimant had bad habits and was always drunk.
19. On cross-examination the witness said that the Claimant disappeared. He also said that the witness had an appointment letter but it is not in Court. The Claimant used to report to work at 8: 30 am to 5: 30 pm. The witness was not in Nairobi when the accident happened. He was sent photos of the accident. The Respondent says the Claimant was drunk when he caused the accident.
20. After the accident on 27th February 2016 the Claimant came back to work on 2nd March 2016. The Claimant has been disciplined many times. The Claimant got a letter after the accident but it is not in Court. Nobody sacked the Claimant but he disappeared around the year 2016 May.
21. Respondent says he never wrote to the Claimant when he did not come to work. The Claimant was not called for a disciplinary meeting and he never paid the Claimant as he had absconded. There were warning letters to the Claimant on 9/4/2016 and March 2018 but he never acknowledged them. The Claimant wrote an apology on the 15/7/2008.
22. On re-examination he said that in May 2016 the Claimant was not terminated but Respondent reported to the labour Office. The Labour office recommended that they pay the Claimant one month salary and he was paid.



Claimant's written Submissions

23. The Claimant submits that his employment was terminated without any justifiable reason contrary to the provisions of section 41 of the [Employment Act](#), 2007. He says after staying home until July 2016 he reported back to the Respondent's premises whereupon he was informed that his services have long been terminated, notwithstanding the fact that no valid reason had been advanced to him neither was he issued with any letter of termination setting out the reasons for his termination as required under section 45 of the [Employment Act](#) 2007.
24. The Claimant submits that Section 43 of the [Employment Act](#) 2007 places the burden of justifying the reasons for the termination upon the employer. Where the employer alleges that an employee has absconded duty, the employer ought to demonstrate the steps taken to recall the employee to attend work or risk being terminated.
25. In the present instance despite the Respondent alleging that the Claimant absconded duty, they have not produced any document indicating any attempt or efforts made to reach the Claimant. The case of [Simon Mbiti Mbane vs Inter Security Services Limited](#) Cause No 805 of 2018 eKLR has been cited for the proposition that an allegation that an employee has absconded duty calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.
26. The case of [Joseph Nzioka versus Smart Coatings Limited 2017](#) eKLR has also been cited in support of the contention that dismissal on account of absconding 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 employee to show cause why services should not be terminated on account of absconding duties.
27. In this case the Respondent have not demonstrated any steps taken to contact the Claimant after the alleged desertion of duty. The Claimant says that the Respondent did not have any valid reason to terminate the Claimant as is required by Section 41 of the [Employment Act](#), 2007.
28. Section 41 requires that before any termination can be deemed fair, both substantive and procedural fairness must be observed. The Claimant says that it was his testimony that prior to his termination, he was neither issued with any notice to show cause why his services should be terminated nor was he called for any disciplinary hearing contrary to section 41 of the Employment.
29. The Claimant further argues that the Respondent through its witness did not deny the fact that the Claimant has never been taken through any disciplinary proceedings as their argument was centred on the allegation that the Claimant had absconded duty.
30. That the Respondent indicated at Paragraph 16 of the defence that the Claimant's employment had become summarily dismissed as a result of absconding duty which position is ignorant of the legal standpoint as regards termination whether it be summary dismissal or otherwise as was held in the case of [Kenya Union of Commercial Food Allied Workers versus Meru North Farmer Sacco Limited](#), 2013 eKLR.
31. The Claimant also relied on the case of [Walter Ogal Anuro versus Teachers Service Commission](#) 2013 ECLR where the Court held that in order to pass the fairness test, it must be shown not only the substantive justification but also the procedural fairness. He submits that the Respondent completely disregarded the mandatory fair procedure envisaged under Section 41 and Section 45 of the [Employment Act](#), 2007.



Respondent's Written Submissions

32. The Respondent submits that the Claimant had on several occasions failed to report to work and that disciplinary process was initiated. The Respondent says that even after their vehicle was involved in the accident and the Claimant charged, he was not terminated and even continued paying him after failing to report to work sometimes in 2016.
33. The Respondent relied on the case of Boniface Francis Mwangi versus B.O.M Iyego Secondary School 2019 where the Court held that it is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.
34. The Respondent contends that its director in his testimony and subsequent cross-examination confirmed that indeed he spoke and made effort to contact the Claimant to which the Claimant never informed him why he was away from duty. Further the Claimant did not indicate to the Court in his testimony or pleadings that he came back to his place of work to resume duties or pick his terminal dues.
35. An employee who makes a claim for unfair termination of employment or wrongful dismissal has statutory burden to prove occurrence of unfair termination of employment or wrongful dismissal has a statutory burden to prove the occurrence of unfair termination of employment as envisaged under section 47(3) of the *Employment Act*.
36. The Claimant stayed away from the employment for 3 months while earning a salary. Despite the efforts made by the Respondent to contact him he did not show up nor did he resume his duties thus the Respondent was justified in terminating him.
37. The Claimant's conduct amounted to gross misconduct which under section 44 (3) of the *Employment Act* 2007 justifies summary dismissal. Nevertheless, the Claimant's position was open till the point he commenced the current suit.

Determination

- a. Whether there was termination of the Claimant's employment.
 - b. If answer to (a) above is in the affirmative, whether the termination was unfair
 - c. The remedies' if any, the Claimant is entitled.
38. Section 45 (1) and (2) of the *Employment Act* 2007 provides that—
- (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”



39. Section 47(1) (5) of the *Employment Act* 2007 provides that:-
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
40. In *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR, the Court of Appeal said that –
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
41. Similarly, Ndolo J in *Walter Ogal Anuro versus Teachers Service Commission* 2013 e KLR held that:-
- “However, for a termination of employee to pass the fairness test it must be shown there was not only substantive justification but also procedural fairness.”
42. The Court of Appeal in *CMC Aviation Limited versus Mohammed NOOR* 2013 eKLR expressed itself as follows:-
- “We respectfully agree that unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of the statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of the employment contract, like where the employer dismisses the employee without notice or without the right amount of notice.”
43. The Claimant says that he was told to go home on or about 5th April 2017. He cannot remember missing work. The Respondent says that the Claimant was never dismissed but absconded duty. The Respondent says the Claimant was called several times by the Respondent’s director but he never came back to work.
44. It is the Respondent’s contention that the Claimant deserted duty after being involved in several instances of gross misconduct including causing an accident while driving the Respondent’s motor vehicle while drunk. The claimant was arrested and charged with offence of careless driving.
45. Desertion of duty is a grave administrative offence which if proved would render an employee liable to summary dismissal as held in the *Ronald Nyambu Daudi vs Tornado Carriers Limited* Cause No 236 of 2016. It is however to enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee and putting them on notice that



- termination of employment on this ground is under consideration must show efforts made towards reaching out to the employee and making it clear that termination is being considered on that ground.
46. The Respondents said he called the Claimant on several occasions back to work. There are no letters/materials tabled before Court to substantiate the entry on the muster roll that indeed the employee absconded work. Nor is there evidence on the follow ups by the Respondent following the unavailability of the Claimant as is asserted by the Respondent. There is no evidence to show the Respondent attempted to reach out to the Claimant.
47. I am supported by the case of Boniface Francis Mwangi vs B.O.M Iyego Secondary School 2019 where the Court held that it is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for failure to present themselves for work.
48. In the absence of any concrete evidence to support the assertion that the Claimant deserted work and such evidence would only have been produced by the Respondent, the Court has no other alternative but to find the Respondent himself terminated Claimant's employment.
49. As to whether the Claimant was unfairly terminated, the Respondent has produced previous warning letters to the Claimant given in the years 2010 and 2013 together with the letter of apology purportedly written by the Claimant. It is apparent from the said documentations and the totality of the Respondent's testimony that the Claimant did have disciplinary issues whilst working for the Respondent. The Claimant also caused damage to the Respondent's vehicle and no doubt the respondent incurred costs repairing the same. The Respondent admitted he tolerated the Claimant a lot and regarded him as his son. The Court finds the claimant had definite disciplinary issues and the Respondent had valid reason to terminate him.
50. That notwithstanding the Respondent did not adhere to the right procedure to terminate the Claimant. Section 41 of the Employment Act provide as follows:-
- “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 the explanation.”
51. There was no notice given to the employee prior to termination nor minutes of any hearing produced by the Respondent or even reasons given for the termination even though there may have been valid reasons. The Claimant was not accorded an opportunity to confront the allegations against him as required by Section 41 of the Employment Act 2007. As well put in the case of Walter Ogal Anuro (supra) for termination to pass the fairness test, it must be shown there was not only substantive justification but also procedural fairness. The Respondent did not follow fair procedure to terminate the Claimant's employment even though he may have had valid grounds to do so. The Court finds for that reason the Respondent failed the fairness test and so declare the Claimant's termination from employment unlawful and unfair.

Remedies

52. The Court having found the Claimant was unlawfully terminated proceeds to give the following awards.
1. One month salary in lieu of notice Kshs 25,000/-.
 2. Claimant was paid for May 2016. No proof he worked for June and July so this is disallowed.



3. House allowance was consolidated into his salary and is disallowed.
4. Claimant has no evidence of overtime worked and so prayer is disallowed.
5. Public holidays are not proved and so are disallowed.
6. Claimant had disciplinary issues during the period he served the Respondent. He only deserves nominal compensation and 2 months is fair compensation. He is awarded Kshs 50,000.
7. In the same argument each party will bear their costs.
8. Claimant is to be issued Certificate of Service within 7 days from today's date.

Total award therefore is Kshs 75,000/- plus interest at Court rates from date of Judgment till full payment.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7TH DAY OF JULY, 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

