



REPUBLIC OF KENYA



KENYA LAW
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**Otwere v Bedrock Holding Limited (Cause 2060 of 2017)
[2022] KEELRC 1192 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1192 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2060 OF 2017**

**JK GAKERI, J
JULY 6, 2022**

BETWEEN

WILSON NYATARA OTWERE CLAIMANT

AND

BEDROCK HOLDING LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim filed on October 16, 2017, the claimant sued the respondent alleging unfair dismissal and non-payment of terminal dues.
2. The claimant prays for;
 - (a) A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair.
 - (b) The sum of Kshs.264,215.03 particularised in paragraph 12 of the statement of claim as
 - (i) One month notice in lieu of notice Kshs.12,597,905/-
 - (ii) House allowance Kshs.33,500.415
 - (iii) Underpayment Kshs.33,336.10
 - (iv) Annual leave Kshs.23,383.5
 - (v) Severance pay Kshs.10,222.25
 - (vi) 12 months compensation Kshs.151,174.86
 - (vii) Total Kshs. 264,215.86
 - (c) Costs of this suit



- (d) Interest on the amount awarded at Court rate.
3. The respondent filed a statement of defence on December 14, 2017 praying for dismissal of the suit with costs.

Claimant's Case

4. The claimant avers that he was employed by the respondent as a night guard on November 1, 2015 at a gross salary of Kshs. 10,000 per month exclusive of house allowance and was not given a copy of the contract of service.
5. That he served the respondent zealously until November 2016 when he was shifted from night to day security guard.
6. That initially he used to collect his salary at Posta, Adams Arcade but from February 2017 payment was through the bank.
7. The claimant further avers that from November 2016, he started experiencing chest problems and later sought medical attention at Mbagathi Hospital where he was diagnosed with Asthma due to exposure to cold nights.
8. It is also averred that in June 2017, Mbagathi Hospital gave him a letter to be on medication for 2 months.
9. That one Linnet, the claimant's supervisor informed him to go home and rest for the 2 months and not report to work, but insisted that he would work. The supervisor refused.
10. That on July 28, 2017 he went to enquire about work but Mr. Walter Odhiambo told him he had been terminated.
11. Finally, it is the claimant's case that he was neither notified of the termination not taken through a disciplinary hearing and was not paid final dues.

Respondent's case**

12. The respondent states that the claimant was employed on November 9, 2015 at a gross salary of Kshs.10,050/- and signed a written contract. It admits having shifted the claimant from night to day and on payment of salary.
13. The respondent avers that it was unaware of the claimant's sickness until he presented a document from Mbagathi Hospital seeking sick leave.
14. That he was paid for the month of May 2017 despite not having worked.
15. It is the respondent's case that the letter from Mbagathi Hospital did not indicate that the claimant be granted sick leave or off days.
16. That the claimant had insisted on paid leave and had exhausted all paid leave days and declined a request to apply for unpaid leave, left the premises and returned on July 28, 2017 returning the uniform stating that he was no longer interested in work.
17. That the claimant's medical record had discrepancies on dates casting doubt on authenticity.
18. The respondent further avers that on July 28, 2017 the claimant declined to sign the official clearance form and deny that its manager could have discussed termination with the claimant.



19. It is the respondent's case that the claimant simply walked away without notice and owes the respondent for desertion and pay in lieu of notice and denies having dismissed the claimant.
20. That the claimant's counsel sent a demand letter to the wrong address and the same was not received by the respondent.

Claimant's Evidence

21. On cross-examination, the claimant confirmed that he had signed the written contract on record and his salary was Kshs.10,050/-.
22. That witness confirmed that he had been attended to at Mbagathi in May 2017.
23. That he sought two months off but the employer declined and he proceeded home for two months and was later told that he had been terminated from employment.
24. That on June 12, 2017 he only spoke to Linnet, the supervisor who advised her to stay at home.
25. That he was underpaid and had no house allowance. That he returned the uniform on June 12, 2017 and proceeded to the hospital.

Respondent's Evidence

26. RW1, Mr. Brian Ochieng confirmed on cross-examination that the claimant's gross pay was Kshs.10,050/- per month and was unaware that the gross pay did not include house allowance.
27. The witness further confirmed that the Respondent was neither making nor paying NSSF contributions and had no NSSF number and knew it was illegal not to deduct and pay NSSF contributions.
28. The witness testified that he had no objection to the claim for severance pay for non payment of NSSF dues.
29. On annual leave, RW1 confirmed that the claimant had proceeded on annual leave but had no documentary evidence to show that the claimant had applied for annual leave.
30. The witness stated that the claimant had in fact absconded duty or deserted the work place and as such was not taken through any disciplinary hearing and no payment was made.
31. On re-examination, the witness was unsure of the minimum wage but insisted that the claimant was no underpaid.
32. Finally, the witness testified that an employee who deserted was not subjected to any disciplinary hearing.

Claimant's submissions

33. The claimant identifies three issues for determination namely;
 - (i) Whether the claimant was terminated or absconded duty;
 - (ii) Whether the claimant's termination was unfair;
 - (iii) Whether the claimant is entitled to the reliefs prayed for.



34. On the 1st issue, it is the claimant's case that the respondent was not candid in that no notice to show cause was issued or filed or disciplinary hearing and no attempts were made to reach out to the claimant and no counter claim had been filed.
35. The decisions in *David Nyanjui Mburu v Sunmatt Limited* [2017] eKLR as well as *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR are relied upon to demonstrate the role of an employer in the event of a desertion.
36. As to whether the termination of employment was lawful, reliance is made on the provisions of the Employment Act and case law to urge that for a termination to pass muster, it must be substantively justifiable and procedurally fair. The decision in *David Gichana Omuya v Mombasa Maize Millers Ltd* [2014] eKLR is relied upon to demonstrate the duty of the employer under sections 43 and 45 of the *Employment Act*.
37. It is submitted that the Respondent had no genuine reason to terminate the Claimant's employment.
38. On procedural fairness, reliance is made on the provisions of Section 41 of the Employment Act and the decision in *David Gichana Omuya v Mombasa Maize Millers Ltd* (*supra*) to submit that the termination was procedurally unfair.
39. As regards the reliefs prayed for, the claimant submits that the one month notice salary is justified by section 36 of the *Employment Act* and no notice was given to the claimant.
40. That house allowance is a right under section 31(1) of the *Employment Act* and was not being paid by the Respondent and the salary was exclusive of house allowance under the relevant Regulations of Wages (General) Amendment Order 2015. The decision in *Irungu Gitbae v Mutbeka Farmers Co-operative Society Ltd* [2019] eKLR is relied upon to urge the submission on entitlement of housing allowance.
41. As regards under payment of the claimant reliance is made on the *Regulation of wages (General) (Amendment) Order 2015* to show that the salary of Kshs.12,221 is exclusive of house allowance effective May 1, 2015 to urge that the Claimant be paid the difference between the minimum wage and the salary paid by the respondent.
42. On severance pay, it is argued that since the respondent did not remit NSSF pay, as evidenced by the Payslips on record, severance pay was available to the claimant.
43. On leave pay, it is submitted that the same should be awarded because the Respondent did not lead evidence of leave pay or leave application forms.
44. Finally on the 12 months compensation, it is submitted that the court should exercise its discretion to award the claimant maximum compensation and cost of the suit.

Respondent's Submissions

45. The respondent raised two issues, namely;
 - i. Whether the claimant was dismissed from employment or absconded duty;
 - ii. Whether the claimant is entitled to the reliefs sought.
46. On the first issue, the respondent submits that the claimant deserted his place of work. Counsel analysed the evidence on record and was convinced that the claimant absconded duty.



47. It is further submitted that the claimant is not a credible witness and relies on falsehood and sent demand letter to a different address.
48. It is the respondent's case that the claimant has devised on false narrative of the supervisor one Linnet, to escape from the accusation of absconding duty, having admitted that he was away from work for 2 months.
49. That the alleged reporting to work on July 28, 2017 was not proved.
50. It is submitted that the claimant was aware of the contents of the contract but did not comply with them.
51. Reliance is made on the decision in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR to urge that parties are bound by the terms of their contract unless there was coercion fraud or undue influence. Counsel for the respondent distinguishes the authority in *Godfrey Anjere v Unique Suppliers Limited* (*supra*) on ground that the claimant is selective in highlighting the paragraphs in the judgement. That the claimant was healthy and absconded duty and had a written contract and refused to communicate with the employer.
52. As regards the reliefs sought, it is submitted that the claimant absconded duty and is not entitled to any relief. That the alleged underpayments were an afterthought as they were not raised during the subsistence of the contract and were not proven.
53. That the salary paid was consolidated and thus included house allowance.
54. That the claimant worked for only 12 days in June 2017 but had computed figures for the entire month.

Analysis and determination**

55. The issued for determination are;
 - i. Whether the claimant's employment was terminated or he absconded duty;
 - ii. Whether the claimant is entitled to the reliefs sought.
56. As to whether the claimant absconded or deserted duty or his employment was terminated by the respondent, the starting point is the definition of desertion.
57. *Blacks Law Dictionary* (9th Edition) defines desertion as:

“The wilful and unjustified abandonment of a person's duties on obligations.”
58. In the South Africa Case of *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish desertion from unauthorised absence as follows:

“...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does not with the intention of not returning or having left her post, subsequently formulates the intention not to return.”
59. The Respondent submits that the claimant absconded duty on June 12, 2017 and did not return at any other point.
60. That the alleged discussion with the supervisor, one Linnet was a creature of the claimant as is the allegation that he reported to the office on July 28, 2018.



61. This submission is reinforced by the fact that the respondent confirmed on cross examination that it did not take the claimant through any disciplinary hearing as he was not available.
62. The emerging jurisprudence from this court on matters germane to desertion by an employee is that the employer is bound to take reasonable steps to ascertain why the claimant was not reporting to work and make them aware of the consequences of their conduct through a notice to show cause and eventual termination of employment.
63. In *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR the court stated.
- “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
64. Similar sentiments were expressed by Nduma J. in *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR and by Abuodha J. in *Simon Mbitshi Mbane v Inter Security Services Limited* [2018] eKLR.
65. The court is guided by these sentiments. If the claimant absconded duty as the respondent alleges, it is unclear when he did so. The claimant’s testimony that he reported to the office on July 28, 2017 was not controverted by RW1. The claimant alleges to have reported to the Human Resource Manger Mr. Odhiambo.
66. Be that as it may even, if the claimant absconded duty as alleged, did the respondent take steps to ascertain the state of affairs and inform the claimant the consequences of his conduct?
67. Judicial authority is also emphatic that for a termination of employment to pass muster, it must be substantively justifiable and must have been conducted in accordance with fair procedure. See *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, *Naima Khamis v Oxford University Press (E.A) Ltd* [2017] eKLR. The claimant testified that he was told to stay home by Linnet, the supervisor, this evidence was not controverted by the Respondent.
68. The court is guided by the sentiments of Onyango J. in *Judith Atieno Owuor v Sameer Agriculture and Livestock Limited* [2020] eKLR as follows;
- “Further even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the Employment Act, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to termination....”
69. The respondent’s witness was unequivocal that if an employee deserted, he was not subjected to any disciplinary hearing.
70. That no steps were taken to contact the claimant or conduct a disciplinary hearing.
71. In a nutshell, the respondent did not avail cogent evidence that the claimant absconded duty or was fairly terminated from employment.
72. For the foregoing reasons, it is the finding of the court that the termination of the claimant’s employment was neither substantively nor procedurally fair.
73. As regards the reliefs prayed for the claimant is entitled to the following;



i. One (1) month salary in lieu of notice Kshs.12,597,905.

74. The respondent did not give notice of termination of employment. The claimant justifies this prayer on section 36 of the *Employment Act* and it is awarded as claimed.
- ii. House allowance Kshs.33,500.415
75. This prayer is grounded on the provisions of section 31 of the *Employment Act* which require the employer to provide housing to employees or pay a housing allowance.
76. The fact that the contract dated November 11, 2015 states that the salary is consolidated is of no moment bearing in mind that the respondent was underpaying the claimant and the only allowance factored in was overtime for the 12 hours shift.
77. RW1 confirmed on cross-examination that he was unaware that the minimum wage was exclusive of house allowance. This is confirmation that the Respondent did not pay house allowance. House allowance is a statutory right. An employee is entitled to at least 15% of the basic pay as housing allowance. See *Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu* [2019] eKLR. The claimant is awarded the sum of Kshs.33,500.415.

iii. Underpayment

78. Under the *Regulation of Wages (General) (Amendment) Order, 2015*, effective May 2015, the salary of a day watchman was Kshs.10,954.70 per month exclusive of house allowance and Kshs.12,221.10 for a night watchman.
79. It is not in dispute that the claimant was underpaid. RW1 confirmed on cross-examination that he was unaware of the minimum wage in 2015 but confirmed that it was an underpayment to pay the claimant Kshs.10,050/- per month.
80. Accordingly, the claimant is awarded Kshs.33,336.10 for underpayment by the respondent.

iv. Annual leave Kshs.23,383.5

81. The claimant led no evidence to prove this prayer. It is neither mentioned in the witness statement nor the oral testimony in court. The prayer is declined.

v. 12 month's salary compensation Kshs.151,174.86

82. Having found that the claimant's termination from employment was unfair, the claimant is entitled to the discretionary remedy under section 49(1)(c) of the *Employment Act*. In compliance with section 49(4) of the Act, the court has taken into account the following:
- i. The claimant was an employee of the respondent for a fairly short time of about 1 year and 9 months.
- ii. The claimant did not appeal the termination.
83. In the circumstances, the court is satisfied that the equivalent of two (2) months salary is fair Kshs.25,195.81.
84. In conclusion, judgement is entered for the claimant against the Respondent for the sum of Kshs.104,630.23 with costs.
85. Interest shall accrue at court rates from the date hereof till payment in full.



86. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF JULY 2022

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE

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