



Kimanthi v Shah (Cause 270 of 2015) [2022] KEELRC 3866 (KLR) (4 August 2022) (Judgment)

Neutral citation: [2022] KEELRC 3866 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 270 OF 2015
AN MWAURE, J
AUGUST 4, 2022

BETWEEN

TABITHA KIMANTHI CLAIMANT

AND

MINESH SHAH RESPONDENT

JUDGMENT

1. The claimant filed its statement of claim dated February 27, 2015 and the respondent filed its claim dated September 17, 2015.

Claimants Case

2. The claimant contends that she was employed by the respondent as a house servant on January 4, 2005 at a monthly salary of Kshs 4,500/- she says on June 29, 2013 the respondent unfairly terminated her employment.
3. The claimant asserts she used to be underpaid against the regulation of wages order and used to work over 17 hours overtime per week. She also claims she used to work on Sundays and public holidays.
4. She says when her employment was unfairly terminated she was not paid one month salary in lieu of notice and severance pay and overtime dues and all the other dues totalling Kshs 1,472,313/40. She also prays for costs and interest at 12% until the amount is paid in full. She is also praying for the certificate of service.

Respondent's Case

5. The respondent in his response says he employed the claimant in January 2007.
6. Further the respondent denies he terminated the claimant's employment but instead says she absconded from duty on July 30, 2013 without any explanation and never returned to work since.



7. The respondent prays the respondents' claim be dismissed with costs.

Claimants Evidence In Court

8. The claimant in her evidence says she was employed on April 1, 2005 at a salary of Kshs 4,500 and no NHIF or NSSF was being paid on her behalf. She says she was not being given annual leave.

Respondent's Evidence

9. The respondent in his evidence in court avers he employed the claimant as a house girl from 2007-2013. He says the salary he paid her was Kshs 10,000/- and it was per the law. He says in June 2013 the claimant asked his wife to be given Kshs 75,000/- to pay her son's school fees and when she was not given she absconded from work and never returned.

10. He says he tried to call her but she never responded. He says he then wrote letter to the labour office to inform them that she had deserted employment. The respondent says he kept records of days claimant worked and wages paid. The letter to the labour office is dated July 10, 2013 and he says she absconded on June 30, 2013.

11. The court considered the submissions by the respective parties.

Claimant's Submissions

12. The claimant avers she was terminated abruptly and without notice. The claimant is relying on the case of *Grace Kerubo Otworu v Jianihxi Jzonei Co Ltd* [2017] eKLR where the court held that the defence of abscondment or desertion of duty more after often than not is not serious. Section 47(5) clearly spells out the distinct roles of parties in delineating their respective cases. Court further held that even if claimant absconded lawful duties she is still entitled to fair disciplinary process as set out in section 41 of the *Employment Act, 2007*. The claimant therefore prays she be granted the prayers as per claim.

Respondent Submissions

13. The respondent in his submissions says the claimant absconded duty after she demanded some Kshs 75,000/- and the same was politely declined. He therefore says that in accordance to section 47(5) of the *Employment Act, 2007* which provides as follows:-

"(5)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."

The claimant has not provided evidence to prove an allegation of unfair termination and therefore her claim fails.

14. The respondent as well asserts that in relation to procedural fairness it was impossible to conduct disciplinary process against the claimant as the respondent failed to trace her whereabouts after making reasonable efforts to do so. The respondent therefore submits that the claimant was unfairly and unprocedurally terminated.

Decision

15. The court will consider whether the claimant was unfairly and unprocedurally terminated or did she abscond from employment. Secondly the court will consider if the claimant is entitled to the prayers contained in her memorandum of claim.



16. The claimant says her employment was terminated on June 13, 2013 after she requested for a salary increment. The respondent on the other hand claims the claimant absconded from her lawful duties when she demanded Kshs 75,000 and was not given the same.
17. The records in court show the union wrote a letter to the respondent on October 31, 2013 which was many months later. Also the labour consultant did a demand on January 28, 2015 on behalf of the claimant. The respondent on the other hand wrote a letter to the labour office on July 10, 2013 and advised them that the claimant had absconded from duty. The respondent further avers he tried to reach out to the claimant but to no avail and he says he even used Mary another of his employee to trace the claimant but they did not get her.
18. In the case of *Simon Mbithe Mbane v Inter Security Services Limited* [2018] eKLR the court held:-

“an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”
19. Going by the evidence adduced in court and the respondent’s letter addressed to the labour office, the court is convinced the respondent made efforts to trace the claimant after she failed to turn up for her duties. The claimant on the other hand has not shown any evidence that the respondent unlawfully terminated her save her allegation in her claim that on June 29, 2013 the respondent unfairly terminated her services. In the submissions the claimant says she was terminated on June 13, 2013 and asserts her memory is vivid and clear. Also in her evidence in court she says she was asked to leave by the respondent’s wife on June 29, 2013 as she had many problems. Indeed the claimant is not even clear when she left employment of the respondent.
19. In all fairness the court finds the evidence adduced including the oral evidence and pleadings and the submissions by the respective parties tilt in favour of the respondent and points to the fact that claimant absconded from her employment and was therefore not unlawfully or un procedurally terminated.
20. The respondent would not have invited her for disciplinary proceedings since she was not traceable. The court therefore finds the claimant has not proved her case on the balance of probability and dismisses it accordingly. Under the circumstance it does not make a difference if claimant was employed in 2005 or 2007.

Remedies

21. The court still is of the opinion that despite finding the claimant was unlawfully terminated the dues to her are still payable.
 - a. However the respondent has established he paid her according to the regulation of wages order and so claim for underpayment is disallowed.
 - b. The severance pay is not payable as claimant did not establish her dues were not remitted to NSSF.
 - c. Also one month salary in lieu of notice is not payable as claimant is the one who absconded from duty.
 - d. The 12 months’ salary compensation and overtime and rest days are not payable under the circumstances and also as they are not specified as well as public holidays.
 - e. Each party will meet their costs.
 - f. The claimant to be issued her certificate of service with 14 days from today’s date



Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 4TH AUGUST 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 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 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.

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

ANN NGIBUINI MWAURE

JUDGE

