



REPUBLIC OF KENYA



Ng'ang'a v Robinson Investment Ltd T/A Robinson Security Guards (Employment and Labour Relations Cause 169 of 2016) [2022] KEELRC 4106 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 169 OF 2016
DN NDERITU, J
SEPTEMBER 29, 2022
(BEFORE HON. JUSTICE DAVID NDERITU)**

BETWEEN

RACHEAL WANJIRU NG'ANG'A CLAIMANT

AND

**ROBINSON INVESTMENT LTD T/A ROBINSON SECURITY
GUARDS RESPONDENT**

JUDGMENT

I. Introduction

1. Vide a memorandum of claim dated May 10, 2016 filed through Ndeda & Associates Advocates, the claimant prays for:-
 - (a) One month's salary *in lieu* of notice in the sum of Kshs 19,403.25
 - (b) Accumulated wages in the sum of Kshs 557,8000.50
 - (c) Accumulated annual leave pay in the sum of Kshs 33,070.25
 - (d) Accumulated overtime pay in the sum of Kshs 435.333.55
 - (e) Accumulated pay for public holidays worked in the sum of Kshs 88,268,60.
 - (f) Three (3) months pay for maternity leave in the sum of Kshs 29,600.25
 - (g) Gratuity in the sum of Kshs 105,129.90
 - (h) Compensation for unfair and unlawful termination in the sum of Kshs 232,839
 - (i) A certificate of service



- (j) Costs.
2. Together with the memorandum of claim was filed a verifying affidavit and several annexures in support of the claim and a witness statement.
 3. The respondent entered appearance on August 16, 2016 through Githiru & Co Advocates and filed a response to the claim on October 3, 2018 in which the respondent denied that the claimant is entitled to the reliefs stated above.
 4. Along with the said response the respondent filed a bundle of documents in support of its position and two witness statements.
 5. On November 28, 2016 the claimant filed a reply to the respondent's response to the claim in which she reiterated the position and the contents in the memorandum of claim.
 6. The respondent filed a further list and bundle of documents on July 12, 2021.
 7. This cause came up in court for hearing on November 4, 2021 when the claimant (CW1) testified in-chief, was cross-examined, and re-examined and she closed her case on that date.
 8. The respondent's case was heard and closed on February 7, 2022 when Agnes Mukami Rutinu (RW1) testified in-chief, was cross-examined, and re-examined.
 9. By consent, counsel for both parties addressed the court by way of written submissions. Counsel for the claimant filed on February 22, 2022 and counsel for the respondent on May 30, 2022.

II. Claimant's Case

10. The claimant's case as contained in her oral testimony, the documentary evidence adduced, the pleadings filed, and the written submissions by her counsel, is that she applied for a job with the respondent as security guardette. She produced the application letter which bears an endorsement from the respondent to the effect that she was employed as applied at a monthly salary of Kshs 2,500/= with effect from October 6, 2006 to be stationed at Kisumu.
11. The claimant testified that her monthly salary was reviewed upwards to Kshs 4,000/- on June 1, 2008.
12. She claimed that she reported to work at 6 am each day and remained thereat till 6 pm and that she was not allowed to take annual leave.
13. Further, the claimant stated that on March 9, 2012 she took maternity leave for three (3) months but she was not paid during the said leave.
14. Again, the claimant alleged that for the period from December, 2007 to March, 2008 she could not attend to work due to the post-election violence and that when she reported back in April, 2008 she was only given Kshs 1,000/= and hence the salary for the four (4) months during which she had been displaced by the violence was not paid.
15. In regard to her termination, the claimant testified that on December 21, 2015 she proceeded on annual leave and she was to resume on January 25, 2016. However, the claimant stated that her child fell sick and she was allegedly granted an extension of the leave.
16. She stated that she reported back to work on February 1, 2016 but the human resource manager, Mr Wanjala, informed that she had been terminated. Further she stated that she was not paid her dues and after failing to get help from the labour office she instructed a lawyer to demand for her dues. She produced as an exhibit a demand letter from her initial lawyers dated March 15, 2016.



17. In cross-examination, the claimant stated that in February, 2013 she was promoted from a guardette to a clerk and that her monthly salary was reviewed upwards to Kshs 9,500/=.
18. The claimant further stated that whenever she took leave the respondent refused to pay her including during her maternity leave. She averred that when she failed to report back to work after leave on January 25, 2016 she informed the human resource manager on phone.
19. The claimant asserted that she was not served with a desertion notice as alleged by the respondent and insisted that she did not desert her duty.
20. In re-examination, the claimant admitted that she took her annual leave in 2012, 2013, and 2014, but she maintained that she was denied pay for the days she was on leave.
21. The claimant stated that she worked for the respondent for a period of nine (9) years and three (3) months with a clean disciplinary record.
22. It is on the basis of the foregoing that the claimant prayed for the reliefs set out at the introductory part of this judgment.

III. Respondent's Case

23. Respondent's case is contained in the pleadings filed (response to the claim), the oral and documentary evidence adduced through RW1, and the written submissions by counsel.
24. The respondent states that the cause as filed by the claimant is premature and the same ought to have been referred to the labour office before filing in court.
25. The respondent avers that the claimant was employed as a day-guard from October, 2006 until she allegedly deserted duty on January 25, 2016. The respondent contends that the claimant was never engaged as a clerk during the entire period of her employment.
26. The respondent alleges that the claimant was a habitual absentee from work and that she had been verbally warned on several occasions. RW1 testified that there were attempts made to contact the claimant after she abandoned duty on January 25, 2016 to no avail. Subsequently, according to RW1, the respondent issued the notice of desertion dated February 3, 2016 which she produced as exhibit.
27. The respondent took the position that it is the claimant who deserted work and hence constructively terminated herself and as such she is not entitled to any compensation.
28. However, when RW1 testified she took a different trajectory (departure) from that what is contained in the pleadings filed. RW1 alleged that the claimant was a casual worker whose services were called for on need basis depending on availability of work. She alleged that the claimant was a general worker who did cleaning, filing, guarding, and such other general duties.
29. RW1 testified that the claimant is not entitled to any of the claims in the memorandum of claim. She alleged that the claimant took all her leave and off days and was paid for all such leave and off days. She testified that the claimant used to work between 8 am and 5 pm and hence the issue of overtime pay does not arise. She stated that the claimant never worked during holidays.
30. Further, RW1 stated that the claimant being a casual was not entitled to maternity leave pay. She stated that there are no salary arrears payable to the claimant.
31. In cross-examination, RW1 admitted that the claimant applied for and was employed as a guardette from October, 2006 but denied that the claimant worked as a clerk at any point. She admitted that



no warning letter was issued to the claimant for absenteeism. She insisted that the claimant absconded duty and that she is not entitled to any of the reliefs sought.

IV. Issues For Determination

32. From the analysis above, and upon incorporating the contents of the statement of agreed issues dated March 20, 2017 executed by counsel for both parties, this court finds the following issues for determination:-
- (i) What was the nature of the employment relationship between the claimant and the respondent?
 - (ii) ii) was the termination of the claimant by the respondent unfair and unlawful?
 - (iii) Is the claimant entitled to the reliefs sought?
 - (iv) Costs.

V. Employment

33. The evidence on record, and this court is obliged to go by it, is that the claimant applied for the position of a security guardette with the respondent *vide* a letter dated September 30, 2006. On the face of the said letter, a copy of which was produced as an exhibit by the claimant, the respondent accepted the said application and engaged the claimant as such at an agreed monthly salary of Kshs 2,500/= with effect from October 6, 2006.
34. Without any authentic evidence or proof, RW1 alleged that the claimant was engaged as a casual worker to perform general duties. This allegation by RW1 cannot contradict or override the written evidence alluded to above - see sections 97 and 98 of the *Evidence Act* (cap 80).
35. It is not in dispute that as at the time of her termination on February 9, 2016 the claimant was earning a basic monthly salary of Kshs 9,500/=.
36. The claimant alleged that as at the time of termination she was working in the administration department as a clerk and or secretary. This has been vehemently denied by the respondent.
37. Other than the letter confirming the engagement of the claimant as a guardette as alluded to above, there is no other letter that appointed the clamant to the position of a clerk or secretary. However, there is a number of leave application forms that were produced by the respondent indicating that the claimant held the position of clerk in the department of administration. In fact, one leave application form dated December 2, 2015 indicates that the claimant was acting secretary.
38. The claimant in her testimony admitted that she was not issued with a letter of the alleged promotion to a clerk or acting secretary or any other position other than the endorsement in her letter of application appointing her as a guardette, dated September 30, 2006.
39. This court has given due consideration to the evidence adduced and submissions made by both sides on the foregoing issue and it would appear in the understanding of this court, that while the claimant was officially engaged as a guardette, she was also directed to do some clerical or secretarial duties on need basis or in the absence of those who were officially engaged to do that work by job description.
40. However, the foregoing does not mean that the claimant was indeed a clerk or a secretary, and this court shall therefore go by the documentary evidence adduced which indicates that the claimant was engaged with effect from October 6, 2006 as a guardette. It is so held.



41. RW1 was not forthright in her testimony. She told the court falsehood including that the claimant was a casual worker while there is a letter of appointment as endorsed in the aforesaid application and the claimant worked for the respondent for over nine (9) years. This type of blatant falsehood need not be told in a court of law.

VI. Termination/dismissal

42. Both parties have given contrasting evidence on how the employment relationship terminated. According to the claimant, she took her annual leave on December 21, 2015 to return to work on January 18, 2016. The leave application form produced by the respondent indicates that the claimant was to proceed on annual leave from December 21, 2015 and return to work on January 20, 2016.

43. The claimant testified that she was unable to return to work at the appointed time as her child fell sick and she was to take care of the child. She stated that she communicated this situation to the human resource manager, Mr Wanjala, on phone and that she was granted permission to remain away until the child recovered. The claimant testified that when she reported back to work on or about February 1, 2016 she was told that there was no work for her and that she was not paid salary for December, 2015 and January, 2016. The claimant testified that she called the human resource manager on February 9, 2016 who informed her that she had been terminated.

44. On the other hand RW1 testified that after the claimant took her annual leave on December 21, 2015 she did not return to work and hence she deserted duty.

45. According to RW1 the claimant deserted duty and the respondent issued the notice of desertion dated February 3, 2016. However, there is no evidence whatsoever that this notice was served and or delivered to the claimant at any point. There is also no evidence from the respondent on what steps the respondent took in trying to trace the claimant and or establishing why she had not reported back to work. In any event, by the time the respondent issued the notice of desertion dated February 3, 2016 the claimant who was supposed to report back to work on January 20, 2016 had been away, purportedly without permission, for only one week.

46. This court has considered and weighed the evidence adduced from both sides. The evidence from the claimant is that as at the end of January, 2016 she had not been paid her monthly salary for two months. However, there is no concrete evidence to confirm that when she realized that she could not be able to report back to work on the appointed time that she did in fact inform the respondent as alleged.

47. On the other hand, there is no evidence that, beyond issuing the notice of desertion, which in any event was not served upon the claimant, the respondent made efforts to trace the claimant after the alleged desertion of duty.

48. It appears, and this court holds so, that after the claimant took leave she extended the same without seeking and or obtaining permission from the respondent. By the time the claimant reported back to work on or about February 1, 2016 the respondent had already made a decision to terminate her.

49. However, the respondent failed to follow the procedure provided for in law in effecting the termination and arriving at that decision. RW1 testified that she hails from the same village as the claimant in Kiambu county. She knew the rural home of the claimant yet there is no evidence whatsoever on the efforts that RW1, as the director of the respondent, undertook to trace the claimant upon the alleged desertion of duty.

50. The claimant, as established in the foregoing paragraphs, was away without permission for about a week. Is this such a long period as for the respondent to use the same as a ground for dismissal? In



the considered opinion of this court, and I so hold, the action taken by the respondent to terminate the claimant based on the alleged absence from duty for about seven (7) days was illogical, excessive, and unreasonable. No matter the effect, consequences, and or inconvenience caused by the claimant's absence from work, it is in the considered opinion of this court that a warning, admonishment, surcharge, and or other measures would have sufficed in the circumstances. This does not in any way imply that the claimant was right in staying away from work without permission from the respondent, although she explained the circumstances and the reasons therefor in court.

51. The need for substantive and procedural fairness in termination or dismissal has been emphasized and settled by this court (ELRC) in a variety of decisions such as *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
52. The claimant was not issued with a notice of dismissal, no hearing was held, and no reasons were given for the dismissal. The respondent therefore failed to comply with sections 35, 41, and 43 of the *Employment Act* (the Act). No good reason has been advanced for the dismissal notwithstanding the provisions of section 44(4) (a) of the Act. One (1) week was too short a time in the circumstances to warrant dismissal. In any event, the respondent did not afford the claimant a hearing to explain the reason(s) for her being away from work.
53. In the entire circumstances of this cause, the respondent did not act in accordance with justice and equity as envisaged under section 45 of the Act.
54. From the foregoing this court has inevitably arrived at the conclusion that the dismissal of the claimant by the respondent was unreasonable, unfair, and unlawful, and it is so held.

VII. Reliefs

55. This court has already found and held that the dismissal of the claimant by the respondent was unreasonable, unfair, and unlawful. Among other reasons, the respondent has failed to demonstrate that the claimant had deserted duty without intention of resuming -see the findings of Radido J in *Philomena Kiprotich Kirui v Lesos Veterinary Suppliers Ltd* (2016) eKLR.
56. The reliefs sought by the claimant have been set out in the first part of this judgment and the court shall now deal with each one of them as hereunder.
57. Prayer (a) is for one month's salary *in lieu* of notice in the sum of Kshs 19,403.25. The claimant alleges that *vide* legal notice No 117 of May 1, 2015 the basic minimum monthly wage for a clerk was fixed at Kshs 16,872.40 and when house allowance at 15% is added it adds up to Kshs 19,403.25.
58. However, this court has found that the claimant was never employed as a clerk or secretary but a guardette and that her monthly salary as at the time of her termination was Kshs 9,500/=. The respondent did not avail evidence to rebut that the claimant was not paid house allowance as she pleaded and testified in court. Under sections 10 and 74 of the Act an employer is obligated to keep employment records. The respondent did not avail the payroll, payslips, and or any other evidence to discount and rebut the evidence by the claimant.
59. In the circumstances, this court finds and holds that as at the time of termination the claimant was earning a basic monthly salary of Kshs 9,500/=. The gross monthly salary, inclusive of house allowance is hence calculated at Kshs 9,500/= +(15/100 x 9,500) = Kshs 10,925/=. The claimant is awarded this sum of Kshs 10,925/= as one month's salary in lieu of notice.



60. Prayer (b) is for accumulated underpayment of monthly salary for the entire period of employment. However, the claimant has not availed any evidence on what the basic minimum monthly wage for a guardette was supposed to be at each stage of the employment. For the said lack of evidence, this court is unable to make any award in favour of the claimant under this head.
61. Prayer (c) is for accumulated annual leave pay for which the claimant alleges that the respondent failed and or refused to pay whenever she proceeded on annual leave. The claimant did not tender evidence, oral or documentary, on how she received her salary. No payslips, Mpesa, or bank statements were produced. In the circumstances this court finds it difficult to establish whether indeed the claimant is owed as claimed for the following reasons.
62. This court has held in the past and still holds that the basic principle and presumption in the law of evidence as laid down in section 107 of the *Evidence Act* obtains unless there is a different principle or presumption in written law that shifts the burden of proof.
63. While sections 10 and 74 of the Act obligates an employer to keep the records of employment, these sections do not obligate an employer to automatically avail and produce such records in court. Where an employer fails and or refused to avail such records the court has the option to presume that the employer has failed to produce the same because if they were produced they would have been against the employer.
64. However, at all times, the law that he who alleges must prove under section 107 of the *Evidence Act* holds. Further section 108 of the *Evidence Act* provides as follows:-
- “108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
65. Section 109 of the *Evidence Act* provides as follows:-
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
66. Going by the above cited provisions of the law, it is the opinion of this court that it was the burden of the claimant to prove that indeed she was not paid for the alleged leave days taken. In case the claimant felt that she needed to rely on the records held by or in the custody of the respondent she was free to issue a notice to produce or summons to any witness through court to avail that evidence in support of her case. This court is not persuaded by the argument that since the employer is ordinarily the custodian of the employment records under sections 10 and 74 of the Act, that the employer should suo motto vail such records without any prompting from the claimant through the process known to law.
67. In the entire circumstances of this cause and the evidence adduced by the claimant, this court is not persuaded to grant prayer(c) as the claimant has failed to prove the same.
68. For the same reasons cited and the law reproduced above this court is denying the claimant, prayers (d), (e) and (f).
69. Prayer (g) is for gratuity. Gratuity, as the name implies, is a gratuitous payment by an employer to an employee in thanking such an employer, in most cases for good service and in appreciation therefor. Gratuity is not a right and the same is paid voluntarily by an employer or where the same is provided for in the contract in accordance with the conditions therein - see the holdings in *Pathfinder International*



Kenya Limited v Stephen Ndegwa Mwangi (2019) eKLR, Bamburi Cement LTD v Farid Aboud Mohamed (2016) eKLR, and H. Young & Company EA Limited v Javan Were Mbago (2016) eKLR.

70. For the reasons stated above, the claimant did not prove that payment of gratuity was provided for in the contract of service and that she has met the conditions precedent to payment of the same. On the other hand, the respondent has not volunteered to pay such gratuity.
71. Prayer (h) is for compensation for unlawful dismissal under section 49(1) (c) of the Act. This court has already found that the dismissal was illogical, unreasonable, unfair, and unlawful. The claimant is seeking for the maximum award of 12 months gross salary.
72. The claimant testified that she did not secure another job after the unlawful dismissal. The respondent did not afford the claimant a hearing and the action taken against the claimant for absconding duty for one week was excessive, illogical, and unreasonable. The respondent did not voluntarily pay terminal dues to the claimant.
73. This court has considered the factors set out in section 49(4) of the Act, and in the entire circumstances of this cause this court finds and holds that an award of 12 months gross salary would be fair and reasonable compensation in the circumstances. In an earlier part of this judgment this court found that the rightful last gross monthly salary for the claimant was Kshs 10,925/=. The compensation is calculated as Kshs 10,925/= x 12 months = Kshs 131,100/=. This court awards this amount accordingly subject to statutory deductions.
74. In regard to prayer (i) the respondent is ordered to issue and deliver to the claimant a certificate of service within 30 days of this judgment.

VIII. Costs

75. Cost follow event and the claimant is awarded costs of this cause to be agreed on or taxed in the usual manner.

IX. Disposal/orders

76. This court issues the following orders in resolution of this cause:-
 - (a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was unreasonable, unfair, and unlawful
 - (b) The claimant is awarded the following:-
 - (i) One month's gross salary *in lieu* of notice
- Kshs 10,925.00
 - (ii) Compensation for unfair and unlawful termination
- Kshs 131,100.00
Total - Kshs 142,025.00
 - (c) Costs of the cause to the claimant.
 - (d) All the other reliefs not specifically awarded are denied and dismissed.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF SEPTEMBER, 2022.

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DAVID NDERITU
JUDGE

