



**Odhiambo v Samani Construction Limited (Cause 2100 of 2017)
[2022] KEELRC 12689 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12689 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2100 OF 2017
JK GAKERI, J
SEPTEMBER 29, 2022**

BETWEEN

EVANS ODHIAMBO CLAIMANT

AND

SAMANI CONSTRUCTION LIMITED RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a memorandum of claim filed on October 18, 2017. The claimant alleges unfair termination of employment, discrimination and non-payment of dues.
2. The claimant prays for;
 - a. A declaration that the dismissal from employment was discriminatory, unprocedural, unfair, unlawful and unconstitutional.
 - b. An order for compensation for violation of the claimant's constitutional rights.
 - c. Certificate of service.
 - d. A fine of Kshs 100,000/= against the respondent for failure to comply with the provisions of section 51(3) of the *Employment Act*.
 - e. Compensation equivalent to 12 months wages Kshs 170,400/=
 - f. One (1) month's salary in lieu of notice Kshs 14,200/=
 - g. Accrued leave days Kshs 13,200/=
 - h. Service pay Kshs 28,673/=
 - i. Punitive and aggravated damages



- j. Unpaid house allowance
- k. Interests on (e), (f) and (g)
- l. Costs of this suit.

The Claimant's case is pleaded as follows;

3. The claimant avers that he was employed by the respondent on or about May 13, 2013 as a casual employee at Kshs 500/= per day which rose to Kshs 550/= in 2014 and to Kshs 600/= by the date of termination of employment, paid in two monthly instalments through the bank.
4. That he discharged his duties with loyalty and dedication until September 20, 2016 when his employment was terminated by word of mouth.
5. The claimant avers that when he reported to work on September 20, 2016, he discovered that his boots were missing and suspected that his colleague Jeffrey Kibira and confronted him but there was no physical fight.
6. That on the same day as they were loading cupboards, the claimant's cupboards slipped off his hands and hit Jeffrey Kibira on the head resulting in an injury.
7. The claimant further avers that Mr Jeffrey Kibira requested Mr Richard Masese for permission to go to hospital but Richard Masese summoned both Jeffrey Kibira and the claimant and informed them that their employment had been terminated but a week later, Jeffrey Kibira resumed work.
8. It is the claimant's case that he was not given a certificate of service.
9. The claimant further avers that the sum of Kshs 7,200/= deposited in his account in December, 2016 was not equivalent to his terminal dues.
10. The claimant avers that his termination from employment was not only discriminatory, malicious and in bad faith but procedurally unfair.
11. That he was not paid housing allowance.

Respondent's case

12. The respondent filed its response on December 19, 2017 admitting that it employed the respondent in May, 2014 at Kshs 600/= per day on recommendation of his father and denies that he was a diligent employee or terminated his employment on September 20, 2016 allegedly due to an altercation with a co-worker.
13. It is the respondent's case that the claimant's narrative of the events is a distortion of facts.
14. The respondent admits that on September 20, 2016, the claimant and other co-workers were loading materials into a vehicle when the claimant confronted Mr Jeffrey Kibira on suspicion of having stolen his boots and engaged him in a physical fight and hit him on the head occasioning serious injuries.
15. That the two were called to Mr Richard Masese's office who promised to investigate the matter and advised Mr Kibira to seek medical attention.
16. That the claimant was very violent and was escorted out by security guards.
17. That it was later discovered that he had lost his boots and the accusations he made against Kibira were false.



18. The respondent avers that although Mr Kibira resumed duty after one week, the claimant did not and his services were never terminated by the respondent.
19. The respondent denies that there was a work related accident on September 20, 2016. That the claimant fled to his rural home fearing arrest over an alleged theft and did not report to the office until December 7, 2016 when he demanded his dues and was paid Kshs 7,200/= for the 14 days he had worked.
20. The respondent admits that the claimant is entitled to leave pay but was a member of the NSSF and NHIF.
21. The respondent prays for dismissal of the suit with costs.

Claimant's evidence

22. The claimant's written statement rehashes the contents of the memorandum of claim.
23. On cross-examination, the claimant stated that he did not suspect anyone had stolen his boots since Mr Kibira was his friend, but quickly changed his testimony that he suspected Mr Kibira had stolen them. The witness confirmed that the boots Mr Kibira had were not his missing boots and admitted confronting Mr Kibira.
24. The claimant alleged that a cupboard he was holding slipped and injured Mr Kibira on the head.
25. That when he and Kibira went to Mr Masese's office, he was chased away and his employment was terminated because of the injury to Mr Kibira. He admitted having been paid Kshs 7,200/= in December, 2016 and had worked for 14 days in September. 2016.
26. The claimant confirmed that he reported in January, 2017 to plead his case.
27. On re-examination, the witness stated that he was not given a dismissal letter.

Respondent's evidence

28. RWI, Mr Richard Masese confirmed on cross-examination that the claimant was a casual employee from 2013 to 2016. He testified that he did not review the CCTV footage for September 20, 2016 to ascertain what had transpired.
29. RWI further testified that the respondent gave its employees boots and overalls. That Mr Kibira was injured on the forehead.
30. The witness confirmed that it was he who summoned the claimant and Mr Kibira to his office and the claimant had refused. That both admitted to have been fighting and were given a one week off. That while Mr Kibira came back, the claimant did not. That in his view, Mr Kibira was more believable than the claimant.
31. The witness confirmed that no disciplinary proceedings were conducted nor did he call the claimant or write to him about reporting back to work. That he regarded the claimant's action as absconding duty as he only sought payment for the days worked.
32. RWII, Mr John Bosire confirmed on cross-examination that he was employed by the respondent in 2010 and had no letter of appointment and his work included carrying items and loading vehicles. The witness confirmed that he knew the claimant and was unaware that leave was payable.
33. That overtime earned was paid as part of the salary as were public holidays worked.



34. The witness further confirmed that on September 20, 2016, he was in the company of the claimant and Mr Kibira loading a vehicle. That at one point, the claimant jumped and hit Mr Kibira with his head injuring him. That Mr Kibira went to Mr Masese's office but the claimant did not.
35. On re-examination, the witness confirmed that the two were fighting. The witness confirmed that he saw claimant hit Mr Kibira.

Claimant's submissions

36. The claimant's advocate submitted on whether the claimant absconded duty, procedure employed by the respondent, absence of a contract of service, conversion of casual employment and the reliefs sought.
37. On desertion or absconding of duty, the counsel submitted that the claimant left the respondent's premises at the instance of Mr Masese. That he was told to go away and no letter of suspension was issued.
38. That the respondent provided no evidence of having informed the claimant to resume work.
39. Reliance is made on the provisions of section 45 and 47(5) of the *Employment Act* to urge that the respondent had no justifiable reason to terminate the claimant's employment and had no termination letter as evidence.
40. The decision in *Joseph Kiprotich Bett v Kenya Commercial Bank Ltd* (2018) eKLR is relied upon to buttress the submission as is the holding of Wasilwa J in *John Muturi Wanjiku v Samani Construction Ltd* (2015) eKLR.
41. It is submitted that no credible evidence was led to show that the claimant deserted the work place.
42. The claimant urged that the provisions of section 41 of the *Employment Act* were not complied with. The decision in *Mary Chemweno Kiptui v Kenya Pipeline Co Ltd* (2015) is relied upon to urge that the provisions of section 41 of the Act are mandatory.
43. On failure of the respondent to issue a contract of service, it is submitted that the provisions of section 9(2) and 10(2) of the *Employment Act* were not complied with.
44. It is further submitted that the claimant's employment transitioned from casual to term as provided by section 37 of the *Employment Act*. The decisions in *Cosmas Kawelu v Kabuito Contractors and Agatha Bugosi Said v Vegpro Kenya Ltd* (2014) eKLR are relied upon to reinforce the submission.
45. It is further submitted that the fact that the respondent was deducting NSSF and NHIF contributions reinforces the submission further.
46. As regards the reliefs sought, it is submitted that the claimant is entitled to Kshs 18,000/= since Kshs 600/= per day multiplied by 30 days is Kshs 18,000/= and no notice had been given.
47. That compensation for unfair termination is Kshs 216,000/= for 12 months since his employment was terminated by word of mouth, had served for 3 years, expected to serve longer, was not given a certificate of service and did not contribute to the termination. The decision in *Moses Kaunda Moro v CMC Motor Group Ltd* (2013) eKLR is relied upon to urge the court to award maximum compensation.
48. It is further submitted that the claimant is entitled to payment for leave, Kshs 9,450/=, house allowance of Kshs 97,200/= and Kshs 93,000/= for rest days as provided by section 27(2) of the *Employment Act*, 2007.



Respondent's submissions

49. The respondent identifies five issues for determination;
- i. Whether the claimant was carrying a cupboard with a colleague when he slipped and injured a co-worker.
 - ii. Whether the claimant had an altercation with the Mr Kibira and injured his head.
 - iii. Whether the claimant deserted duty or his employment was terminated.
 - iv. Whether the claimant is entitled to the reliefs sought.
 - v. Whether the claimant is indebted to the respondent.
50. On the first issue, it is urged that the evidence on record showed that the claimant engaged one Jeffrey Kibira in a physical fight on suspicion he had stolen his boots and injured him as confirmed by RWII, Mr Bosire who witnessed the altercation.
51. That the claimant's story about cupboards was a fabrication of facts the respondent submits.
52. As regards the second issue, it is submitted that the claimant initiated the fight and attempts by Mr Masese to cool him down failed and had to be escorted out to return after one (1) week. That Kibira reported the fight to Mr Masese.
53. It is submitted that the claimant's evidence is inconsistent and false in that the demand letter dated April 20, 2017 makes no reference to a fight or alleged accident at the work place which is contradicted by the statement and oral evidence.
54. It is urged that the respondent did not terminate the claimant's employment but he absconded duty.
55. On reliefs, it is submitted that the claimant was not a credible witness and was incompatible. The decision in *James Epusy v Petroplus Kenya Ltd* (2020) eKLR is relied upon.
56. It is submitted that the claimant was to blame for termination of his employment. The decision in *Ebrahim John Amwayi v Mabati Rolling Mills Ltd* (2014) eKLR is relied upon to urge that the claimant absconded duty.
57. The respondent submits that the claimant is not entitled to the reliefs sought since he deserted duty and the respondent had not commenced disciplinary proceedings. That the provisions of section 44(4) of the *Employment Act* were applicable.
58. The respondent argues that the claimant did not resume duty after one (1) week as instructed by Mr Masese, while Mr Kibira did.
59. The respondent's counsel argues that the respondent has been consistent that the claimant absconded duty as he did not return after 7 days off. The court is urged to find that the claimant has failed to prove that his termination from employment was unlawful.

Determination

60. The issues for determination are;
- i. Whether the claimant transitioned from casual to term employment.
 - ii. Whether the claimant's employment was terminated by the respondent or he absconded duty.



- iii. Whether the claimant is entitled to the reliefs sought.
61. As to whether the claimant’s employment transitioned from casual to term, the provisions of section 37 of the *Employment Act* are emphatic that;
- Notwithstanding any provisions of this Act, where a casual employee –
- a. Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - b. Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to that contract of service.
- (2) . . .
- (3) An employee whose contract of service has been concerted in accordance with sub-section (1) and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
62. It is not in dispute that the claimant was an employee of the respondent for over 3 years and although partial attendance records show that he did not report to work every day, the respondent led no evidence to show that the claimant had not satisfied the requirements of section 37 of the Act. Moreover, RWI confirmed on cross-examination that by September 20, 2016, the project the claimant was involved in had not been accomplished.
63. For the foregoing reasons, the court is satisfied that the claimant’s employment contract transitioned from casual to term and was therefore entitled to leave and rest day days among other rights.
64. As to whether the claimant’s employment was terminated by the respondent or he absconded duty, the parties have adopted contrasting positions. While the claimant asserts that his employment was terminated by word of mouth, the respondent maintains that the claimant deserted the work place, as was the case in *John Muturi Wanjiku v Samani Construction Co Ltd* (2015) eKLR.
65. *Black’s Law Dictionary 9th Edition* defines desertion as;
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
66. In the South African decision in *Seabolo v Belgavia Hotel* (1997) 6 BLLR 829 (CCMA), the court distinguished desertion from unauthorised absence as follows;
- “. . . Desertion is distinguishable from absence without leave, in that the employee who deserts his/her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return.”
67. From the evidence on record, it is apparent that the claimant and one Mr Jeffrey Kibira were involved in a fight on September 20, 2016 and Mr Richard Masese gave the two certain instructions. It is unclear



whether they were given similar instructions. What is clear is that the claimant left and Mr Kibira left thereafter to seek medical attention.

68. Evidence on record reveal that the claimant did not speak to anyone after he left Mr Masese's office.
69. Regrettably, Mr Masese has no record of what transpired in his office and did not follow up the instructions he had given to the two with a letter to confirm the same for records and admitted as much on cross-examination.
70. Similarly, he had promised to carry out an investigation on the issue but had no report on it. He merely confirmed that he believed Mr Kibira and allowed him to resume duty.
71. The claimant's evidence is that he was chased away by Mr Masese and was not told to return.
72. In his statement, the claimant avers that he returned to the office after two weeks but the secretary informed him to wait for a call. That Mr Masese gave him similar instructions. However, Mr Masese denied having seen the claimant until December, 2016 when he came for his dues.
73. Noteworthy, the court found the claimant's evidence inconsistent in several respects. As adverted to elsewhere in this judgement, on cross-examination, the claimant stated that he did not suspect who had taken his boots but thereafter changed and admitted that he suspected Mr Kibira and confronted him and later learnt that another employee had stolen the boots.
74. Similarly, the claimant was emphatic that he had no physical confrontation with Mr Kibira yet he hit him in the presence of John Bosire, RWII.
75. In addition, the evidence that Mr Kibira was injured in at the work place was not reported to anyone and there is no record of the same having been made by the claimant. This narrative appear to have been a creation of the claimant.
76. Finally, in the demand letter dated April 20, 2017, the claimant states that he found Mr Kibira with the boots while on cross-examination, he stated that the boots Mr Kibira had were not his.
77. In addressing the defence of absconding duty or desertion, the court is guided by the sentiments of Onyango J in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR as follows;

“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, is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
78. Similar sentiments were expressed by Abuodha J and Nduma J in the *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR and *Nzioka v Smart Coating Ltd* (2017) eKLR respectively.
79. Finally, the court is in agreement with the holding of Onyango J in *Judith Otieno Owuor v Sameer Agriculture and Livestock* (2020) eKLR thus;

“Further, even if she had absconded duty, she is by law entitled to a fair disciplinary hearing 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.”



80. It is common ground that the respondent made no attempts to contact the claimant to resume duty and did not issue any notice regarding his employment. RWI confirmed on cross-examination that he neither wrote to him nor call him.
81. For the above stated reasons, the court is satisfied and finds that the respondent has failed to demonstrate that it took reasonable steps to ascertain why the claimant did not report to work.
82. The allegation that the claimant run away to his rural home for fear of arrest after having been involved in a theft was not tested in court.
83. The respondent has on a balance of probability failed to establish that the claimant absconded duty. The allegation by RWI that he investigated the desertion was unsubstantiated.
84. Significantly, RWI confirmed on cross-examination that the claimant was not taken through a disciplinary hearing. The court is in agreement with the claimant's submissions that section 41 of the *Employment Act* prescribe a mandatory termination process as explained in *Mary Chemweno Kiptui v Kenya Pipeline Co Ltd* (Supra).
85. For the foregoing reasons, the court is satisfied that termination of the claimant's employment was unfair for want of procedural propriety.
86. As regards the reliefs sought, the court proceeds as follows;
- (a) A declaration is hereby issued that termination of the claimant's employment by the respondent was discrimination, unprocedural, unfair and unconstitutional.
87. As adverted to above, termination of the claimant's employment by the respondent was procedurally unfair. Noteworthy, the claimant led no evidence that he was discriminated in any manner and when.
- (b) Compensation for violation of Constitution rights
88. The claimant adduced no evidence to substantiate this prayer. It is declined.
- (c) Fine of Kshs 100,000/= against the respondent
89. This is not a civil relief but a criminal sanction which this court has no jurisdiction to grant in such a case.
- (d) Certificate of service
90. The claimant is entitled to a certificate of service by dint of section 51 of the *Employment Act*.
- (e) One month's salary in lieu of notice Kshs 14,200/=
91. The claimant is entitled to one (1) month salary in lieu of notice as no termination notice was given by the respondent.
- (f) 12 months compensation Kshs 170,400/=
92. Having found that claimant's employment was terminated by the respondent unfairly, the claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act*.
93. As enjoined by section 49(4), the court has taken the following into consideration;
- i. The claimant was an employee of the respondent for a duration of about 3 years.
- ii. The claimant had one warning dated June 28, 2016 on his poor attendance and was warned of dismissal if the poor attendance persisted. Relatedly, the claimant's attendance record for



April, May, June, July, August and September, 2016 show that he absented himself from work regularly. In June, 2016 for instance, he was away for 10 days.

- iii. The claimant only visited the company's premises in December, 2016. He lead no evidence of having enlisted his father to urge his case if he wished to continue in employment.
 - iv. The claimant substantially contributed to his termination by engaging colleague in a fight at the work place.
 - v. The respondent employed the claimant without a written contract of service and alleged that he was a casual employee for the entire duration of his employment contrary to the provisions of the Employment Act, 2007.
94. In the circumstances, the court is satisfied that the equivalent of two (2) months' salary is fair.
- (g) Payment in respect of leave days.
95. The respondent admitted that the claimant is entitled to leave pay and is awarded leave pay for the outstanding number of days less the day he was absent without authorization of the respondent.
- (h) Service pay Kshs 28,673/=
96. This claim was unsustainable. Evidence on record reveal that the respondent deducted and remitted NSSF contributions, a fact the claimant relies upon to urge that he was a term employee as opposed to casual, which the court is in agreement with.
- The prayer is declined.
- (i) Punitive and aggravated damages
97. The claimant led no evidence to establish entitlement to this prayer. It is neither pleaded nor proved.
- The prayer is declined.
- (j) Housing allowance
98. Since the claimant's salary was based on daily wage of Kshs 600/=, it was inclusive of house allowance as provided by the Regulation of Wages (General) Amendment Orders 2013, 2015 and 2017. The daily wage for general labourers in Nairobi was Kshs 470.60, Kshs 527.10 and Kshs 622 respectively. From May 1, 2015, the claimant was entitled to Kshs 622/= per day for the days worked upto September 20, 2016.
99. The claimant was underpaid by Kshs 22/= for all the days worked from May 1, 2015 to September 20, 2016.
100. Be that as it may, the claimant neither pleaded nor proved underpayment. Granted that the claimant's monthly salary was computed on the daily wage for the days worked, it is inclusive of house allowance and no housing allowance is owed by the respondent.
101. More significantly, no amount was claimed under this head. It is trite that special damages must be pleaded and proved.
- The prayer is declined.
102. In conclusion, judgment is entered for the claimant against the respondent as follows;
- a. One month's salary in lieu of notice Kshs 14,200/=



- b. Equivalent of two months' salary Kshs 28,400/=
- c. Accrued leave days less the days the claimant absented himself without authority.
- d. Costs of this suit.
- e. Interest at court rates from date of judgement till payment in full.

103. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER 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 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.

DR. JACOB GAKERI

JUDGE

