



REPUBLIC OF KENYA



KENYA LAW
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**Mwakindeu v Mombasa Cement Limited (Cause 438 of 2017)
[2022] KEELRC 3938 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3938 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 438 OF 2017
JK GAKERI, J
SEPTEMBER 20, 2022**

BETWEEN

JACQUELINE ZIPPORAH MWAKINDEU CLAIMANT

AND

MOMBASA CEMENT LIMITED RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 2nd March, 2017 and filed on 6th March 2017, the Claimant sued the Respondent alleging unfair termination of employment and non-payment of outstanding leave days and prays for;
 - i. A declaration that the decision to dismiss the claimant from employment amounts to unfair termination.
 - ii. An order reinstating the Claimant to her employment with the Respondent in the same position and benefits.
 - iii. One (1) month's salary in lieu of notice
 - iv. Compensation for unfair termination
 - v. Service pay
 - vi. Accumulated leave days
 - vii. Costs of the suit
 - viii. Certificate of service
 - ix. Interest at court rates from date of filing of the suit.



Claimant's case

2. The Claimant avers that she was employed by the Respondent in December 2012 as a trainee Sales Clerk.
3. That after serving the probationary period, the Claimant was confirmed as a permanent employee effective 2nd January 2015 as a Sales Clerk and served the Respondent for 4 years one month and at the time of termination her monthly salary stood at Kshs. 27,500/=.
4. The Claimant further avers that she served the Respondent honestly, dutifully and obediently.
5. It is alleged that in November 2016, the Claimant applied for 5 days leave effective 23rd December 2016 and the application was duly approved by the Head of Department her supervisor, and proceeded on leave to report back on 6th January, 2017. That when the Claimant reported to work on 6th January 2017, she was not allowed into the premises.
6. That on inquiry, the Head of Security at the gate informed her that he had been instructed by the Human Resource Manager to disallow her into the premises.
7. It is further averred that the Human Resource Manager interdicted the Claimant for no valid reason and the Claimant could not resume duty for having a pending issue with management.
8. The Claimant avers that it was impractical to resume duty and had no choice but go home and await further communication from the Respondent in light of the pending issue but having not received any communication from the Respondent within a reasonable time, she instructed a firm of advocates who wrote to the Respondent on 23rd January 2017 and no response had been received by 6th March 2017 when the suit herein was filed.
9. It is the Claimant's case that the Respondent's conduct was malicious, unlawful, illegal, unprocedural and in violation of the provisions of Section 44(2) of the *Employment Act*, 2007 and the Claimant suffered loss due to loss of employment.

Respondent's Case

10. The Respondent filed its response on 6th July, 2017 stating that it employed the Claimant on 2nd January, 2015. It denies that the Claimant was an outstanding performer, honest, dutiful or obedient.
11. It is the respondent's case that the leave application by the Claimant on 15th November 2016 was declined and was to be taken at the discretion of management.
12. That the Head of Department informed her that the leave would not be approved and was notified of the same by the Human Resource and Administration Manager (HR&AM) on 23rd November, 2016, due to increased workload.
13. It is averred that the Claimant was thus aware that the leave application had been declined and had therefore absented herself from work without leave from 23rd December 2016 till 6th January 2017, a duration of 8 days and the inter-office note dated 6th January was issued.
14. The respondent avers that the interdiction was just and valid due to the Claimant's unauthorised absence.
15. The Respondent further avers that attempts to reach the Claimant fell through, as exemplified by the email dated 21st March, 2017.



16. It is the Respondent's case that Claimant did not respond to the email dated 21st March, 2017.
17. That the Claimant triggered the events that culminated in the interdiction on 6th January, 2017.
18. That the Claimant's absence from the workplace without leave or other lawful cause amounted to gross misconduct.
19. It is the Respondent's averment that it did not terminate the Claimant's employment and is thus not entitled to any of the reliefs sought.

Claimant's evidence

20. The Claimant adopted the written statement which rehashes the contents of the Memorandum of Claim.
21. On cross-examination, CW1 confirmed that she was employed on 2nd January 2015 as evidenced by the contract dated 16th January 2015.
22. She testified that she had no evidence to show that leave had been granted, although the application was signed by the Head of Department.
23. It was the Claimant's testimony that she was out of the office from 23rd December 2016 to 5th January 2017 and did not communicate with the employer during the leave period.
24. Although the witness testified that she applied for 5 days, the application form shows she had applied for 7 days and would report on Tuesday 3rd January, 2017 but reported on 6th January, 2017 allegedly due to transport challenges and did not communicate with the employer.
25. That when she reported on 6th January, 2017, she was denied access to the premises and returned home to await a call by the Respondent and neither called the Head of Department nor the Human Resource Manager.
26. On re-examination, the Claimant testified that she was not given any document after lodging her application for leave but the Head of Department had signed the application form.
27. It was her testimony that transport is a challenge during the Christmas break.

Respondent's evidence

28. The respondent's witness Mr. Samuel Maranga Mwieria adopted the written statement and was cross-examined. The witness confirmed on cross examination that the Claimant applied for leave on 15th November 2016 and the application was signed by the Head of Department.
29. It was his testimony that the Claimant was notified by word of mouth that the application was unsuccessful.
30. That when the Claimant reported on 6th January, 2017, the witness did not see her. He further testified that attempts to reach the Claimant were unsuccessful.
31. The witness testified that the Respondent received the demand notice on 23rd January 2017 but had by then not terminated the Claimant's employment.
32. It was RWI's testimony that the suit herein was filed before 21st March 2012 when an email was send to the Claimant attaching thereto a notice to show cause.



33. It was also confirmed that there was a communication to the security at the gate not to allow the Claimant into the premises until a pending issue had been resolved and thus she could not access the premises without authority of the Human Resource Manager or the Factory Manager and had no record of the Claimant's authority to access the factory.
34. Finally, the witness testified that the Respondent did not write to the Labour office.
35. On re-examination, the witness stated that the Claimant did not reach out to the Respondent, her leave had not been approved and her employment was not terminated.
36. It was his evidence that all leave application forms had to be approved by the Human Resource Manager.
37. That the email address used to forward the show cause letter was obtained from the Claimant's Curriculum Vitae (CV) in the Respondent's records and had a phone number and postal address.

Claimant's submissions

38. As to whether the Claimant's leave was irregular or she absconded duty, it is submitted that after the application was approved by the Head of Department, the Claimant received no further communication of the purported refusal.
39. That the leave application on record is a creation of the Respondent and was never brought to the attention of the Claimant. That the company's tradition was that once leave was approved by the Head of Department that was all.
40. It is further submitted that if the leave application was rejected, the Factory Manager ought to have written a statement to that effect.
41. It is urged that the fact that the Claimant's leave was not approved was discriminatory and malicious.
42. It is further submitted that the Claimant's leave was approved and she did not abscond duty as alleged and reported on 6th January, 2017 but was denied access.
43. As regards the alleged disciplinary process, it is submitted that the Claimant admits having been interdicted for taking leave which is an entitlement, a violation of section 46 (b) of the [Employment Act](#), 2007 and the respondent did not invite her for a disciplinary hearing.
44. That she was invited for a hearing after the suit was filed using a disused email address and the same was never received.
45. It is submitted that the Claimant was not invited for a disciplinary hearing.
46. As to whether termination of employment was unfair, it is urged that the Respondent's conduct towards the claimant fell short of the requirements of the law. The provisions of section 45 of the [Employment Act](#), 2007 and the decision in [Peter Kamau Mwaura and another V National Bank of Kenya](#) (2020) eKLR are relied upon in support of the submission.
47. Finally, as regards the reliefs sought, it is submitted that the Claimant's right to fair labour practice was violated and is thus entitled to compensation.

Respondent's submission

48. As to whether the Claimant's leave was approved or she absconded duty, it is submitted that the form on record was her application.



49. That she proceeded on leave without approval of the Human Resource Manager and thus had no authority to do so and did not inform the employer her whereabouts. The decision in *Caroline Gathoni Gikonyo V Kenya Association of Investment Group* (2015) eKLR is relied upon to buttress the submission.
50. The respondent submits that the Claimant's mind was made up to attend a family function and even overstayed and cannot use the lack of transport as the excuse for reporting late and all employees cannot be granted leave at the same time.
51. Relatedly, the Claimant made no effort to contact the Respondent until 6th January, 2017.
52. It is submitted that the Respondent had no tradition of Head of Department approving leave and discounts the possible evidence of the Head of Department, Mr. Kerai.
53. It is submitted that the Claimant absconded duty.
54. As regards termination of employment, it is urged that the Claimant's leave application form was not approved by the Human Resource Manager despite approval by the Head of Department.
55. That approval of leave by the Human Resource Manager was mandatory and the Claimant overstayed the leave days applied for and had made prior arrangements whether leave was granted or not.
56. The decision in *Anthony Thuo Kanai V Cannon Assurance Ltd* (2018) eKLR is relied upon to urge that the Claimant absented herself from work without permission, as are the provisions of section 44(4) (a) of the *Employment Act*.
57. The decision in *Caroline Gathoni Gikonyo* (Supra) is used to urge that the employee is bound to inform the employer their whereabouts and should not be compensated for the days they were away.
58. That the Claimant failed to attend the disciplinary hearing following the email invitation on 21st march, 2017 and was never terminated from employment.
59. As to whether the Claimant is entitled to the reliefs sought, it is submitted that Claimant's last contract was dated 16th January 2015 and she was never dismissed or terminated from employment and is thus not entitled to the reliefs sought and had no pending leave days.

Determination

60. The issue for determination are:
 - i. Whether the Claimant's leave was regular or she absconded duty.
 - ii. Whether termination of the Claimant's employment was fair.
 - iii. Whether the Claimant is entitled to the reliefs sought.
61. As to whether the Claimant proceeded on regularly obtained leave or absconded duty, the homeport is the evidence on record.
62. There is no dispute that the Claimant applied for 7 days leave effective 23rd December 2017 to 3rd January 2017 and the Application for leave form was signed by the Head of Department, Mr. Kerai.
63. It is the Claimant's case that the Head of Department informed her that she could proceed on leave when time came and that the Respondent had a tradition that approval of leave by the Head of Department was sufficient.



64. That the Respondent did not at any time communicate to her the fact that her leave application had been rejected. This is the basis on which she proceeded on leave.
65. The Respondent on the other hand testified that leave application had to be approved by the Human Resource Manager and in this case the Human Resource Manager did not approve the Claimant's leave application.
66. RW1 testified that the Claimant was notified of the refusal to proceed on leave by word of mouth.
67. It is unclear when and by whom the communication was done as no credible evidence was availed. The fact that the Respondent did not avail its Head of Department to adduce evidence on what transpired weakened its assertion.
68. Typically, application for leave in many reputable organizations is in writing and approval or decline of the application is communicated in writing.
69. For unexplained reason, the Respondent is urging the position that application had to be in writing but the approval/disapproval was communicated by word of mouth.
70. This line of evidence and submission is too incongruous to be relied upon as the true state of affairs.
71. The Respondent's witness did not controvert the Claimant's evidence that the Respondent had a tradition where an employee could proceed on leave after its approval by the Head of Department and having been an employee since 2012, the Claimant may have been relying on past experience.
72. The Respondent's submission that the Claimant had a scheduled family event which she had to attend is untenable as no evidence of the event or date was led.
73. More significantly, the Claimant had no document to the effect that her leave application dated 15th November 2016 had been declined by the Human Resource Manager.
74. For the above stated reasons, the court is satisfied and finds that the Claimant proceeded on regularly approved leave or with implied authority of the Respondent and did not abscond duty as submitted.
75. Be that as it may, the court is in agreement with the Respondent's submission that the Claimant overstayed her leave by three days and did not communicate the same to the employer or the Head of Department.
76. The court is in agreement with the sentiments of the court in *Caroline Gathoni Gikonyo V Kenya Association of Investment Groups (Supra)* that

“... The Claimant was simply away from work and failed to communicate her circumstances to the employer which was her duty to do so. She should not be made to receive pay due to her own making.”
77. If the Claimant had in fact proceeded on leave without authority or lawful cause, nothing prevented the Respondent from issuing a notice to show cause or warning before or after she reported on 6th January, 2017.
78. The denial of access into the premises signified ambivalence on the part of the Respondent. The Respondent gave no indication whether its instructions to the guards was based on the fact that the Claimant proceeded on leave without authority or had overstayed the leave.
79. The purported letter to show cause sent to an email address allegedly extracted from the Claimant's Curriculum Vitae yet she had an official email address was sent almost 3 months after the alleged



unauthorised leave of absence and after the suit herein had been filed in court and Orders made that the application for urgency be served and inter partes hearing scheduled for 20th March, 2017. Counsel for the Respondent applied for 21 days to respond but was accorded 14 days.

80. The email was purportedly sent the following day yet the Respondent was patently aware that the Claimant had an advocate on record who had not only sent a demand letter in January 2017 but had filed a suit.
81. RW1 denied knowledge that the email to the Claimant was filed long after the case was filed an assertion the court found dishonest.
82. He also denied that the email was an afterthought which in the circumstances of this case is not believable.
83. Finally, the Respondent's allegation that attempts to reach out to the Claimant fell through is unsupported by evidence. RW1 led no evidence of the telephone number(s) the Respondent attempted to reach out to the Claimant and when. It is also unclear who did so, if at all.
84. But more significantly, the Leave Application Form had a telephone number for purposes of contact, No. xxxx.
85. Secondly, the letter of Appointment dated 16th January 2015 had a postal address, P.O Box 26108 – 00200 Nairobi.
86. Finally, other documents in the Respondent's custody had the contacts of the Claimant's next of kin namely, the sister, one Purity Mwakideu xxxx and her father, one John Mwakideu, xxxx.
87. As regards termination of the Claimant's employment, while the Respondent alleges that it did not terminate the Claimant's employment, the Claimant urges that the relevant provisions of the Employment Act were not complied with.
88. In determining this issue, it is essential to ascertain if at all the Respondent terminated the Claimant's employment and when.
89. It is not in contest that the Claimant proceeded on leave for several days effective 23rd December, 2016 and did not report back until 6th January 2017 and the Respondent denied her access to the place of work allegedly for pending issues that were not explained to her.
90. The Claimant testified that she went back home to await further communication but received none nor did she call the Head of Department or the Head of Human Resource after she was denied entry.
91. RW1 confirmed on cross-examination that the Claimant could only access the factory with authority of the Head of Human Resource or the Factory Manager and he had no record that such authority was given to the Claimant.
92. From the evidence on record, the Respondent left the Claimant in limbo and did not communicate to her until the alleged email of 21st March 2017 at 3.40 pm under the subject Letter to show cause: Jacqueline Zipporah Mwakideo sent to email address jackykrsty@yahoo.com under Ref: Unauthorised Leave of absence stating as follows;

“The management has noted that you have not reported to work since 23rd December 2016 to date. In addition, you have not communicated to the office of your whereabouts, resulting in wilful insubordination and gross negligence of your duties. You are advised to submit a



written explanation or come in person on 27th March 2017 to explain on your unauthorised leave of absence.

Treat this as very urgent.

CC: Human Resource Office

Yours sincerely

Dr. Rushein Delwash PhD (BA&M)

Mombasa Cement Limited

Athi River/nairobi (kenya)”

93. Instructively, this email was written after the court granted orders on the Certificate of Urgency filed on 6th March, 2017 which the Respondent was aware of as it had been served as ordered by the court and was represented by counsel on 20th March 2017.
94. Was the Claimant an employee of the Respondent by 21st March 2021?
95. It is not in dispute that after the inter office note was issued on 6th January 2017, the Claimant could not and did not access the Respondent’s premises thereafter and consulted an advocate two weeks later who wrote to the Respondent on 23rd January, 2017.
96. RWI acknowledged that the latter was received on the same day and was not responded to until the suit herein was served upon the Respondent.
97. The issue for determination is whether denial of access to ones place of work while not on any defined interdiction or suspension amounts to constructive dismissal.
98. The court is persuaded that denial of access to the place of work could amount to constructive dismissal as was defined by Lord Denning in *Western Excavating ECC Ltd V Sharp* (1978) 2WLR344 as follows;

“If the employer is guilty of conduct which is a significant breach going of the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reasons of the employers conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.
99. The Court of Appeal adopted the contractual approach test on the principle of constructive dismissal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR in the following words;

“. . . For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract constitute a repudiatory breach of the contract is



one of mixed fact and law . . . The employee must be able to show that he left in response of the employer’s conduct (i.e cause link must be shown, ie the test is causation)”

100. The Court went further and enunciated the guiding principles for determining whether constructive dismissal has taken place or not.
101. The court is guided by these sentiments.
102. Applying the above principles to the facts of the instant case, the court is satisfied that the Respondent’s conduct of issuing an inter-office note dated 26th January, 2017 which effectively barred the Claimant from its premises with no timelines or actionable on her part left her with no option but to quit or treat herself as having been dismissed.
103. As adverted to elsewhere in this judgement, the Respondent neither acknowledged nor responded to the Claimant’s advocate’s letter dated 23rd January, 2017 and did not bother to contact the Claimant until the alleged email on 21st March 2017 almost three (3) months after the alleged unauthorised leave of absence.
104. The denial of access to the workplace for an undefined duration and lack of further communication on the way forward was conduct of the Respondent which the Claimant interpreted as a repudiatory breach of the contract of employment which gave her authority to treat herself as discharged from performance of her obligations under the contract of employment.
105. For the foregoing reasons, the court is satisfied that the Claimant has on a balance of probability established that her dismissal from employment was unfair.
106. Having found that termination of the Claimant’s employment was unfair, I will now proceed to determine whether the Claimant is entitled to the reliefs sought.

(a) – A declaration that the decision to dismiss the Claimant from employment amounts to unfair termination and is unprocedural and hence illegal.

107. Having found that termination of the Claimant’s employment was unfair a declaration of that effect is hereby issued.

(b) – An order reinstating the Claimant to her employment with the Respondent in the same position and benefits.

108. In light of the duration that has lapsed since the claimant left employment, the discretionary remedy of reinstatement under section 49 (3) (a) of the *Employment Act*, read together with section 12 (1) (viii) of the *Employment and Labour Relations Court Act*, 2011, has been overtaken by events and thus unavailable. The prayer is declined.

(c) – One (1) month salary in lieu of notice

109. The Claimant is award one (1) months gross salary in lieu of notice Kshs.27,500/=.

(d) Service pay Kshs. 55,000

110. A copy of the Claimant’s payslip on record shows that the Respondent was making NSSF deductions and is thus presumed to have been a member of the NSSF and thus ineligible for service pay by virtue of section 35(6) of the *Employment Act*, 2007.

The prayer is disallowed.



(e) Compensation for unfair termination

111. Having found that the Claimant's employment was constructively terminated, the Claimant is eligible for the discretionary remedy of compensation under section 49 (1) (c) of the Employment Act.
112. In determining the level of compensation, the court has taken into consideration the following;
- i. The Claimant contributed to the termination of her employment by setting in motion a concatenation of events that led to her dismissal. She overstayed the leave.
 - ii. The Claimant made no attempt to contact the Respondent during and after the leave days. She neither contacted the Human Resource Manager nor the Head of Department.
 - iii. The Claimant wished to continue in the Respondent's employment as exemplified by the prayer for reinstatement.
 - iv. The Claimant was an employee of the respondent for 4 years, one month.
 - v. The Claimant had no previous record of misconduct or warning.
113. In light of the foregoing, the court is satisfied that the equivalent of 3 months salary is fair Kshs.82,500/=
- (f) Accumulated leave days 13 days Kshs 11,916.67
114. The Claimant led no evidence of when the days claimed accrued. Neither the written nor the oral testimony make reference to leave days.
- The prayer is declined.
- (g) Certificate of service.
115. The Respondent to issue certificate of service by dint of section 51 of the Employment Act.
116. In conclusion, judgment is entered for the Claimant against the Respondent in the following terms;
- a. One (1) month's salary in lieu of notice Kshs.27,500/=
 - b. Equivalent of 3 month's salary Kshs.82,500/=
 - c. Costs of this suit.
 - d. Interest at court rates from date of Judgment till payment in full.
 - e. Certificate of service.
117. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH 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 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

