



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Owino Bunyasi v Carewatch Security (Cause 2049 of 2017)
[2022] KEELRC 3921 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2049 OF 2017
JK GAKERI, J
SEPTEMBER 19, 2022**

BETWEEN

EPHRAIM OWINO BUNYASI CLAIMANT

AND

CAREWATCH SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a memorandum of claim filed on October 12, 2017. The Claimant alleges that he was unfairly and/or unlawfully dismissed from employment and was not paid terminal dues.
2. The Claimant prays for;
 - a. A declaration that the respondent's dismissal of the claimant from employment was unlawful/unjustified and unfair.
 - b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
 - c. An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs.662,222.40 comprising:
 - i. One months salary in lieu of notice Kshs.12,221.10
 - ii. Unpaid leave Kshs.29,534.33
 - iii. Service/gratuity Kshs.17,720.60
 - iv. Public holidays Kshs.21,658.51
 - v. Unpaid overtime Kshs.265,802.40



- vi. Underpayment Kshs.31,288.00 (September 2014 – April 2015)
- vii. Underpayment Kshs.62,653.20 (May 2015 – April 2016)
- viii. Underpayment Kshs.46,989.90 (May 2015 – April 2016)
- ix. Off-days Kshs.27,701.16
- x. 12 months salary compensation Kshs. 146,653.20

Claimant's case

3. It is the claimant's case that he was employed by the respondent from September 2014 as a Security Guard at Kshs.7,000/= per month and discharged his duties dutifully and diligently.
4. The Claimant avers that he was underpaid.
5. He alleges that on 2nd January 2017, the respondent dismissed him from employment through a text message from his supervisor Charles Sabuni who informed him that his services were no longer required and that he had been replaced.
6. It is the Claimant's case that when he reported to work on January 23, 2017 for inquiries about the dismissal, he called one Mr. Nelson Kimiya, the Respondent's director who was quick to ratify that the claimant had been dismissed after which he returned home.
7. It is the claimant's case that the summary dismissal from employment by the Respondent was unlawful and unfair in that he had done nothing wrong to warrant dismissal and was not subjected to due process.

Respondent's case

The Respondent case is pleaded as follows;

8. The claimant applied for employment in November 2014 and was employed by the respondent as Security Guard at a monthly salary of Kshs.7,000/= per month, 21 days annual leave and a gratuity of 5% on premature termination/retirement after confirmation.
9. The respondent avers that the Claimant had taken 4 days leave days and was to resume duty on January 15, 2017 but reported on January 23, 2017 and thus waived entitlement to the reliefs sought.
10. The respondent further avers that the claimant's salary was consolidated.
11. It is the respondent's case that the claimant requested for four (4) days off duty effective January 11, 2017 to resume duty on January 15, 2017 but failed to do so. That the supervisor called him on January 17, 2017 but he did not pick the call. That a message via the mobile phone followed, warning the claimant of the consequences of absconding duty.
12. The respondent further avers that on January 23, 2017, the claimant reported to his duty station at 7.30 pm without the supervisor's knowledge but found a reliever. That the claimant called the Supervisor and the Director who advised him to report the following day but did not.
13. That the Claimant's whereabouts remained unknown until the respondent received a demand letter.
14. It is the respondent's case that the claimant absconded duty.
15. That attempts by the respondent to settle the matter fell through due to the Claimant's non-appearance.



Claimant's evidence

16. On cross-examination, the Claimant confirmed that the 4 off-duty days he had requested for were to run from 19th January, to January 23, 2017 and he reported on January 23, 2017 but found another person.
17. The witness acknowledged that he had received a text message from the supervisor but could not recall the date.
18. It was his testimony that the Director confirmed on phone that the Claimant had been dismissed.
19. It was the Claimant's testimony that he did not write to the respondent on the alleged dismissal but his counsel on record wrote on March 31, 2017.
20. On re-examination, the Claimant testified that off-days were recorded in the Occurrence Book maintained by the respondent.
21. That when he resumed duty on January 23, 2017, he was told to leave. That his employment was terminated by the supervisor by a text message and his phone was spoilt and he could not avail the text message.
22. The witness testified that he was not taken through any disciplinary hearing.

Respondent's evidence

23. RWI, Mr. Charles Sunga Sabuni, on cross-examination stated that the Claimant indeed applied to be off-duty for 4 days from 9th to 11th January, 2017 by word of mouth but did report back. That he texted the Claimant on 17th January, 2017 having called him on 15th and January 16, 2017. The witness admitted that he had no evidence of the message.
24. He told the court that he did not issue a notice to show cause or other letter at all.
25. The witness confirmed that he advised the Claimant to report to work on January 24, 2017 but he did not and absconded duty.
26. On re-examination, the witness testified that the reliever called him at 7.30 p.m to confirm that the Claimant had reported to the work station.
27. That RWI talked to the Claimant and advised him to report to work the following day.
28. RWII, Mr. Nelson Kavagi Kimiya confirmed on cross-examination that the Claimant's employment was terminated on account of desertion of duty and attempts to reach him had been unsuccessful.
29. That he did not report to work on January 15, 2017 as agreed with the supervisor.
30. The witness admitted that he had no evidence that leave had been granted as he had no attendance register or evidence of the calls made to the claimant.
31. It was his testimony that the respondent called the claimant 8 days after he absconded duty and did not report the same to the Labour Office or issue a notice to show cause nor was the Claimant taken through a disciplinary hearing.
32. He testified that the Claimant over stayed his off-duty days and was not dismissed and was not paid terminal dues as he absconded duty.



33. The witness confirmed on re-examination that although an attendance register is maintained, it was not in court.
34. That no monies were due to the claimant.
35. Finally, the witness testified that the claimant's salary was Kshs.7,000/=, that the respondent did not issue payslips nor pay overtime to staff.

Claimant's submissions

36. The Claimant identifies three issues for determination;
 - i. Whether the claimant is guilty of desertion as contended by the respondent.
 - ii. Whether the claimant is entitled to the reliefs sought.
 - iii. Who should bear the costs of this suit.
37. As regards the first issue, the claimant relies on the provisions of section 43 of the *Employment Act* to urge that the respondent gave no reason for terminating the claimant's employment.
38. That he was simply told that his services were no longer needed.
39. The provisions of section 45 of the Act are also relied upon to further urge that the respondent failed to give valid reasons for the claimant's dismissal from employment and as a cover up raised the allegation of desertion.
40. The decision in *Seabodo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* and *Charles Kikovo Mutua V Pro-Motors Works (2018) eKLR* are relied upon for the definition of desertion.
41. It is submitted that even if the Claimant absconded duty, he was entitled to a fair disciplinary process as prescribed by section 41 of the *Employment Act*.
42. It is further submitted that for the provisions of Section 44 (4) (a) of the Act to apply, there must be evidence of absence of attendance, efforts made to contact him, notice to the last known address and notice to the Labour Officer.
43. That failure to avail evidence of the foregoing renders the allegation whimsical and the respondent led no evidence to establish that the claimant absconded duty from January 15, 2017.
44. Reliance is made on the decision in *Felistas Achecha Ikatwa V Charles Peter Otieno (2018) eKLR* to urge that the respondent made no attempt to contact the Claimant.
45. The decision in *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR* is relied upon to demonstrate that for a termination of employment to be deemed fair, it must be substantively justifiable and procedurally fair.
46. It is urged that the respondent had neither proved desertion nor fair termination of the claimant's employment.
47. As to whether the claimant is entitled to the reliefs sought, it is urged that the claimant is entitled to notice pay by dint of section 36 of the *Employment Act*, leave pay as ordained by section 28 of the *Employment Act* and Service gratuity/pay as he was not a member of the NSSF.



48. As regards Public Holidays, it is submitted that the claimant was never paid at double rate and only proceeded on holiday during Christmas. Reliance is made on the decision in *Edwin Odhiambo Sindala V Samba Enterprises Ltd and another* (2018) eKLR.
49. On overtime, it is urged that the claimant worked 4 extra hours per day and was not paid at 1.5 rate per hour and the respondent availed no records.
50. On underpayment, it is submitted that the salary of Kshs.7,000/= per month was below the statutory minimum wage according to the Regulation of Wages Orders 2013 and 2015 and the respondent did not provide records on how much it was paying the claimant.
51. On damages, it is urged that the claimant served the respondent for about 3 years and is thus entitled to the 12 months compensation.

Respondent's submissions

52. The respondent identifies two issues for determination, namely; whether the claimant's employment was terminated or he deserted the work place and whether the claimant is entitled to the reliefs sought.
53. On the first issue, the respondent relies on the South African decision in *Seabolo V Belgravia Hotel* (supra) as well as section 44(4) (a) of the *Employment Act* to urge that the claimant left the respondent's premises and never resumed duty or provide an explanation until a demand letter was received. That his residential address was unknown to the respondent and show cause letter could not be issued.
54. It is the respondent's case that the claimant absconded his duties.
55. As to whether the claimant is entitled to the prayers sought, the respondent submits that notice pay is not due as the claimant absconded duty and leave pay was not supported by any evidence.
56. As regards severance pay, it is submitted that it is not due because the same was not due according to the contract of employment.
57. It is submitted that the claimant provided no evidence of the alleged underpayment or entitlement to overtime pay.
58. Finally, on damages, it is submitted that the prayers should be dismissed since the claimant deserted duty.
59. Finally, the respondent submitted that it is willing to provide a certificate of service.

Analysis and determination

60. The issues for determination are;
 - i. Whether the claimant's employment was terminated by the respondent or he absconded duty.
 - ii. Whether the claimant is entitled to the reliefs sought.
61. As to whether the claimant absconded duty or his employment was terminated by the respondent, the homeport is the jurisprudence on desertion and termination of employment.
62. *Black's Law Dictionary (9th Edition)* defines desertion as;

“The wilful and unjustified abandonment of a person's duties or obligations.”



63. In the South Africa case of *Seabolo V Belgravia Hotel* (1997) 6BLLR 829 (CCMA), the court explained desertion as follows;

“ . . . desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with the intention of not returning or having left her post, subsequently formulates the intention not to return voluntarily and consciously aware.

On the other hand, an employer may deduce the intention of not returning to work from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

64. This court has adopted similar reasoning in cases where an employer pleads desertion.

65. In *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR, Onyango J. stated 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 the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

66. Similar sentiments were expressed by Abuodha J. in *Simon Mbitshi Mbane V Inter Security Services Ltd* (2018) eKLR and Nduma J. in *Nzioka V Smart Coatings Ltd* (2017) eKLR.

67. The court is guided by these sentiments.

68. Evidently, for desertion or absconding of duty to occur, the employee must have made a conscious and voluntary decision while aware of the consequences likely to ensue.

69. In the instant case, the respondent submits that the claimant absconded duty from January 15, 2017 when he was due to return from the 4 days leave he had sought from the respondent and was granted and efforts to reach him on his mobile number were unsuccessful and the respondent had no forwarding address for letters to the claimant.

70. The claimant on the other submits that he took leave from January 19, 2017 and reported on January 23, 2017 only to find a replacement at the work station.

71. Regrettably, the respondent as the custodian of employment details tendered no evidence of the mobile number it was calling or what it did for closure of the issue such as notifying the Labour Officer or attendance records or leave application records.

72. It is unclear why the respondent did not have the claimant’s Postal Address yet the letter of application for employment drawn by the claimant dated November 15, 2014 had a postal address No. 55195 – 00200 Nairobi. It also had a telephone number 0725366589.

73. In addition, the referees letter dated November 15, 2014 had a telephone number too, which the respondent could have used to reach the claimant if he indeed had absconded duty.

74. The respondent led no evidence that it dispatched a letter to this address and the same was ‘returned to the sender’.

75. More significantly, RWI confirmed on cross-examination that the respondent did not issue a notice to show cause or notify the Labour Officer.



76. For the above stated reasons, the court is satisfied that the respondent has on a balance of probability failed to demonstrate that it took reasonable steps to ascertain the whereabouts of the claimant to resume duty or issue the necessary notices to commence the disciplinary process.
77. In a similar vein, judicial authority is categorical that for a termination of employment to pass muster, it must be not only substantively justified but also procedurally fair.
78. The court is guided by the sentiments of Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR and the Court of Appeal in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR.
79. The claimant testified that when he called the Director, Mr. Nelson Kimiya, the Director confirmed that indeed he had been dismissed from employment.
80. Instructively, at the opening of the cross-examination, RWII Mr. Nelson Kimiya confirmed that the claimant was terminated because he deserted duty.
81. Having failed to establish that indeed the claimant absconded duty, the claimant's evidence of termination of employment without any due notice remain uncontroverted.
82. The court is in this respect guided by the sentiments of Onyango J. in *Judith Otieno Owuor V Sameer Agricultural & Livestock Ltd* (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.”
83. For the foregoing reasons, it is the finding of the court that the termination of the claimant's employment by the respondent was unfair.
84. The respondent led no documentary evidence of when the claimant proceeded on the 4 days leave and when he was due to return and from what date he absconded duty if that was the case.
85. Similarly, it led no evidence to show that the claimant's employment was terminated fairly.

Reliefs

86. Having found that termination of the claimant's employment was unfair, I will now proceed to examine the reliefs that commend themselves for issuance.
- i. One month's salary in lieu of notice.
87. Having found that the respondent terminated the claimant's employment without any notice, the prayer is awarded.
- ii. Unpaid/untaken leave
88. Neither the statement of claim nor the written or oral evidence provide the particulars of the unpaid leave prayed for. There is no evidence on when it accrued and how many days are involved.
- The prayer is unproven and is disallowed.
- iii. Service/gratuity pay



89. The respondent availed no evidence to demonstrate that the claimant was a member of the NSSF or other provident fund. The prayer for service pay is award by dint of section 35(5) of the Employment Act, Kshs.17,720.60.
- iv. Untaken/unpaid public holidays
90. Neither the claimant's written statement nor oral evidence make reference to the public holidays or the number of days involved. The claimant led no evidence of his work week or whether he worked during public holidays.
- The prayer is disallowed.
- v. Unpaid overtime 4 hours daily
91. Analogous to the claim for unpaid public holidays, the claimant led no evidence of his reporting and exit timings. Neither the written nor the oral evidence in court allude to when he reported or left the work station. The meticulous computation by counsel for the Claimant is unsupported by evidence and being a species of special damages, the claim must be proved. The prayer is denied.
- vi. Underpayment
92. RWII confirmed that the claimant's salary was Kshs.7,000/= and no pay slips were available. The court is satisfied that the salary paid by the respondent was below the minimum wage for security guards and the Claimant is entitled to the difference. Employers are bound to comply with the Regulation of wages (*General*)(*Amendment*) *Orders* as and when they are published by the Cabinet Secretary for Labour, pursuant to the provisions of section 46 of the Labour Institutions Act, 2007.
93. The sum of Kshs.137,020.1 is awarded for underpayment from November 2014 (as per the date of application for employment and employment dated November 15, 2014).
- vii. Untaken off-days.
94. The claimant led no evidence of his work week or off-days. Neither the memorandum of claim nor the written statement or oral evidence given in court allege that a specific number of off-days were not paid.
- The claim is declined.
- viii. 12 month's salary compensation.
95. Having found that termination of the claimant's employment by the respondent was unfair, the claimant is eligible for the discretionary relief provided under section 49(1) (c) of the Employment Act.
96. In the determination of the level of compensation, the court has taken into consideration the following factors;
- i. The claimant was an employee of the respondent for about 2 years, 2 months, a fairly short time.
- ii. The claimant did not appeal the decision in any way or demonstrate enthusiasm to continue working such as reporting back to the company after termination.
- iii. The claimant had no record of misconduct or disciplinary issue for the duration he served the respondent.
97. In light of the foregoing, the court is satisfied that the equivalent of 3 months salary is fair Kshs.36,663.30



98. In the final analysis, Judgement is entered for the claimant against the respondent as follows;
- a. One month's salary in lieu of notice Kshs. 12,221.10
 - b. Service pay Kshs. 17,720.60
 - c. Underpayment Kshs.137,020.10
 - d. 3 month's salary Kshs. 36,663.30
 - TOTAL Kshs.203,625.01
 - e. Costs of this suit
 - f. Interest at court rates from date of Judgement till payment in full.

99. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH 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

