



**Kiriinya v Kiwara & another (Cause 7 of 2021)
[2022] KEELRC 13134 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13134 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 7 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

PATRICK KIRIINYA CLAIMANT

AND

LAWRENCE KARIUKI KIWARA 1ST RESPONDENT

**MERU SCHOOL (THROUGH BOARD OF MANAGEMENT) 2ND
RESPONDENT**

JUDGMENT

1. This matter was originated by way of a Statement of Claim dated February 12, 2021. It does not disclose any issue in dispute on its face.

The respondents in a response to claim dated March 30, 2021 denies the claim and prays that it be dismissed with costs.

2. The claimant's case is that at all material times relevant to this case, he was an employee of the Respondent at a basic salary of Kshs.15,000.00 per month.

The Claimant's other case is that he exuded exemplary performance and loyalty to the term and condition of his employment.

His other case come out thus;

7. The claimant had not been paid for two years of 2017 and 2018 when he had agreement with the defendants to keep his money for the two years as he intended to use the same for his children school fees.

3. He cites the following as particulars of unfair termination of employment;

a. Terminating the employment contract of the claimant unfairly.



- b. Failing to give reasons for termination and to prove that the reasons for the termination are valid.
- c. Failing to give reasons for termination and to prove that the reason for termination is a fair reason.
- d. Failing to give reason for termination and to prove that the reason for termination is related to the employees conduct, capacity or compatibility.
- e. Failing to give reasons for termination and to prove that the reason for the termination is based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.
- f. Failing to act in accordance with justice and equity in terminating the employment of the claimant.
- g. Failing to follow the statutory requirements connected with the termination, including the issuing of a certificate under Section 55(1) of the Employment Act and procedural requirements set out therein.
- h. Failing to give lieu notice before termination.
- i. Failing to pay the claimants his money

He prays as follows;

- a. Declaration that the termination was unlawful and illegal.
- b. Unlawful termination 12 X 15000.....Kshs.180,000
- c. 2 years salary for the years 2017, 2018 (24 x 15000)...Kshs.360,000
- d. 4 months pro-rata leave.....Kshs.60,000
- e. One month lieu notice salary.....Kshs.15,000.
- f. 6 months unpaid salary for the year of 2020.....Kshs.90,000
- Total..... Kshs.705,000/-
- g. General damages.
- h. Costs of the suits.
- i. Interests on prayers i, ii,iii,iv,v, above.

4. The 1st Respondent in defence protests his joinder to the suit in a personal capacity and avers that he has no contractual or employment relationship in that capacity with the claimant. This is as follows;

3. The 1st Respondent further avers that his joinder in this suit in his personal capacity offends the provisions of the Fourth schedule part 1 paragraph 1 of the Basic Education Act, Act No.14 of 2013. The 1st Respondent shall seek to have his name struck of or expunged from these proceedings and the claimant is hereby put on notice.

5. In this jointed response, the 2nd Respondent admits its particulars and position and further avers as follows;



- a. That the claimant was engaged by the 2nd Respondent as its second driver on a two year contract with effect from January 2, 2017.
- b. That before the expiry of the said contract, on November 26, 2018 the claimant wrote a resignation letter and resigned from employment with effect from December 30, 2018. (A copy of the resignation letter is filed herewith as document No.1)
- c. That the claimant left the 2nd Respondent's employment on December 30, 2018 having received all his employment dues and without any claim against the 2nd Respondent.
- d. That in March, 2019 the claimant came back and pleaded with the 2nd Respondent to get back his position. The 2nd Respondent agreed to engage the claimant on casual basis whereby the claimant would be engaged only when the second bus was needed. The claimant was paid commission after every trip made.
- e. That in the month of May, 2019 the 2nd Respondent engaged the claimant on monthly terms at a salary of Kshs.15,000/- per month. The claimant worked up to the month of May 2020 and did not report back on duty thereafter. The claimant was paid all his dues up to the month of May 2020 and the Respondent do not owe him any dues at all.

6. It is her further case that the claimant's employment was never terminated but instead, he deserted work from the month of May, 2020.

Further, the 2nd Respondent in denial on the events and action of the officer avers that the claimant's claim is frivolous, unmerited and unwarranted.

She further denies;

Unfair termination of employment. Demand and notice to sue Violation of any provisions of the law

7. The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the Respondent.
2. Whether the termination of employment with the claimant by the Respondent, if at all, was wrongful, unfair and unlawful.
3. Whether the claimant is entitled to the relief sought.
4. Who bears the costs of this cause.

8. The 1st issue for determination is whether there was a termination of the employment of the claimant by the Respondent. The parties hold diametrically opposed positions on this.

The Claimant in his written submissions dated April 27, 2021 posits as follows;

The Kenyan Government has put in place various measures in an attempt to halt or slow the relentless march of the virus. One of steps taken is the imposition of a night curfew published as Legal Notice No.36 – The *Public Order (State curfew) Order, 2020* under the *Public Order Act*, Cap 56. The Legal Notice, which will henceforth be referred to as the Curfew Order, is the subject of these proceedings.

9. This is in rebuttal of a case of desertion of duty as submitted by the Respondent. It is his case that his was not desertion but absence from duty in terms of the prevailing Covid -19 regulations and protocols in place at the time.



The claimant further seeks to buttress his case by relying on the authority of *Seablo v Belgravaia Hotel* (1997) 6 BLLR 829 (CCMA), the court held thus;

“...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 his or her post, subsequently formulates the intention not to return. 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 out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.

10. He further seeks to rely on Section 47 (5) of the [Employment Act, 2007](#) which variously shifts the burden of proof between an employee and employer on a case of determination of unlawful termination of employment and provides as follows;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

11. Further, the claimant submits in reliance to the case of [Joseph Ouko Lwambe v Royal Garment Industries EPZ Limited](#) (2018) eKLR which cited with authority the case of [Walter Ogal Anuro v Teachers Service Commission](#) (2013) eKLR, the court held thus;

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the [Employment Act, 2007](#) and missing that essential ingredient and a hearing the court reaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

12. It is his case that the Respondents/employers have not satisfied their burden of proof of lawful termination of his employment.

The Respondents case is that vide a letter dated November 26, 2018 the claimant resigned from employment with effect from December, 2018. This is evidenced in the annexure to the Respondent witness statement dated April 12, 2021.

It is her further case that the claimant came back later and requested for re-employment and was hired on a need and casual basis until he deserted work in early 2020.

13. Later, the claimant was re-employed in May, 2019 and deserted employment in May, 2020. It is on the basis of his absence and desertion from duty that he was ultimately terminated from employment. This is after due disciplinary process of which he did not participate.

The Respondent enlists a case and submission and resignation and sought to rely on the authority of [William Kariuki v Kenya Civil Aviation](#) (2008) eKLR, where the court agreed with the plaintiff's submissions that there is no way an employee who has resigned can subsequently be dismissed as the act of resignation effectively terminates the employment.

14. The Respondents case overwhelms that of the claimant. It is clear that the claimant resigned from his first employment but was re-employed on a casual and need basis until May 2019 when he was taken back into permanent employment. Even on this, the claimant was to desert work ostensibly on the basis and pretext of Covid-19 and he protocols. He was eventually terminated from employment on



the basis of desertion of duty. He cannot therefore be heard to deny this and reclaim his contract of employment. This is tabulated and he has not come out of his way to rebut the same.

The claimant has also not come out of his way to controvert the case of desertion as set out by the Respondent. He merely comes out in denial and uses Covid-19 protocols as a camouflage for his failures. In any event, the claimant has not controverted the respondents case of casual employment at the tail end of their relationship. I therefore find a case of no termination of the employment by the respondent and hold as such. And this answers the 1st and 2nd issues for determination. The analysis above incorporates the legality or otherwise of the termination.

15. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears the costs of their case.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.Njagi Marete

JUDGE

Appearances

Miss Aketch instructed by Vivian Aketch & Company Advocates for the Claimant.

Mr. Kariuki instructed by Mithega & Kariuki Advocates for the Respondents.

