



**Mucheru v Olooltepes Picnic Site Limited (Cause 1135 of 2016)  
[2022] KEELRC 13045 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13045 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1135 OF 2016  
JK GAKERI, J  
OCTOBER 31, 2022**

**BETWEEN**

**REGINA WANGARI MUCHERU ..... CLAIMANT**

**AND**

**OLOOLTEPES PICNIC SITE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 10<sup>th</sup> June, 2016 alleging unfair termination of employment by the Respondent.
2. The Claimant avers that she was employed by the Respondent on 29<sup>th</sup> August, 2009 as a Bar Service attendant at Kshs.8,500/= per month until her employment was terminated on 22<sup>nd</sup> January, 2016 when she was earning Kshs.12,500/= per month.
3. It is the Claimant's case that the Respondent gave no reason for termination of employment.
4. That a colleague called to inform her that her name was on the list circulated on that date yet it was her off day.
5. The Claimant avers that her termination from employment was in violation of the law and prays for;
  - a. Respondent to be ordered to pay the Claimant terminal and contractual dues amounting to Kshs.1,895,118.84 comprising;
    - i. One month's salary in lieu of notice Kshs.12,500
    - ii. Public Holiday Kshs.67,307.8
    - iii. Service charge Kshs.50,480.85
    - iv. House allowance Kshs.67,500



- v. Unpaid leave Kshs.70,673
  - vi. Overtime Kshs.1,476,657
  - vii. Compensation Kshs.150,000
  - viii. Certificate of Service
  - Total Kshs.1,895,118.84
- b. Costs of this suit and interest thereon at court rates.
  - c. A declaration that termination of the Claimant's employment was unfair and unjust.

### **Respondent's case**

- 6. In its Memorandum of Response filed on 26<sup>th</sup> July, 2016, the respondent denies having employed the Claimant on the date alleged or at the salary pleaded.
- 7. It further denies that she was away on off day or any list existed
- 8. The Respondent avers that the Claimant was engaged on a casual basis and was not entitled to the reliefs sought.
- 9. It is the Respondent's case that the Respondent is an open air resort with several entertainment and resort facilities such as butchery, bar, swimming pool and a large field with natural vegetation where revellers camp for picnic and playing grounds for team building tracks and bicycle riding.
- 10. The Respondent further avers that it had a work force of 15 persons all engaged on casual basis and only functions over the weekends and public holidays and was not busy on weekdays to justify permanent staff.
- 11. That the Claimant would be engaged as a waitress.
- 12. It is the Respondent's case that the Claimant had challenges of punctuality, arrogance and rude to colleagues and absconded duty.
- 13. That the Claimant had been served with several disciplinary and warning letters by the employer and had been suspended.
- 14. It is the Respondent's case that the Claimant had conspired with other employees especially the guard to sell her own stock at the expense of the Respondent.
- 15. It is the Respondent's averment that on 15<sup>th</sup> February, 2016, the Claimant and three of her colleagues came to the Respondent while intoxicated and confronted the Manager hallowing abuses at her and were unruly and rowdy in the presence of all and sundry and were as a consequence suspended indefinitely to await communication from the Respondent, only for the Respondent to receive a demand letter.
- 16. The Respondent further avers that it did not terminate the Claimant's employment and prays for the dismissal of the claim with costs.

### **Claimant's evidence**

- 17. In her written statement, CWI testified on the date of employment and her off days, Thursday and Friday as well as the alleged call from a colleague, Mr. Njoro about those who were supposed to work after suspension and what transpired when they reported.



18. On cross-examination, the Claimant stated that she used to work from 9 a.m to 12 midnight but had no evidence of the same or overtime pay agreement.
19. It was her testimony that she was not given a termination letter or letter of suspension. That she was informed by a telephone call.
20. The witness denied having been issued with a warning letter and denies having sold her alcoholic drinks at the Respondent's establishment.

### **Respondent's evidence**

21. RWI, Ruth Mopel testified that the Respondent is an open air resort with 15 casual employees and operated on weekends and public holidays.
22. The witness testified that from January 2015, the Claimant reported to work late regularly and often violated the dress code, sold personal drinks at the workplace and in October 2015, the Claimant had a bill of Kshs.13,000/= which was deducted from her income and had several warning letters.
23. On cross-examination, the witness confirmed that the Claimant was an employee from 2009 and worked on weekends and public holidays.
24. The witness further testified that she had reported the Claimant to the police but had no evidence of the OB entry and the Claimant was not prosecuted.
25. Similarly, the witness had no evidence that the Claimant was selling own alcoholic drinks at the place of work.
26. The witness further confirmed that she handed over the letters to the Claimant and retained a file copy.
27. That the incident on 15<sup>th</sup> February, 2016 was not reported to the police.
28. The witness testified that the Claimant had been suspended and reported on that day and was drunk and no termination notice was given.
29. Finally, RWI stated that she did not pay the Claimant one month's salary.
30. RWII, Mr. Joshua Mbithi confirmed on cross-examination that he assisted in the purchase of stock, payments and books of accounts.
31. Strangely, the witness stated that he did not notice any anomalies in the stock or sales.
32. The witness testified that he was in the office on 15<sup>th</sup> February, 2016 when he heard people shouting obscenities while marching towards the Manager's office adjacent to his. That they shouted at the manager but were not armed. That he stood at the door of his office and did not intervene.
33. On re-examination, RWII testified that the Claimant's salary was Kshs.2,500/= per week and not Kshs.4,000/= as he had indicated in cross-examination.
34. That witness confirmed that the Claimant and other colleagues had been suspended for 14 days after discovery that they were selling alcoholic drinks from other places.
35. That on 15<sup>th</sup> February, 2016, the Claimant and her colleagues came at around 4 p.m and were drunk.

### **Claimant's submissions**

36. The Claimant's counsel address the issues of whether termination of the Claimant's employment was unfair and entitlement to the reliefs sought.



37. On termination of employment, it is submitted that the Claimant was not accorded an opportunity to be heard and RWII did not notice any anomalies in the stocks and sales.
38. Reliance is made on the provisions of section 45 of the *Employment Act*, 2007 to underline the burden of proof of the employer.
39. The decision in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR is used to underscore the essence substantive and procedural fairness in termination of employment.
40. It is submitted that the Respondent had no evidence to substantiate the allegation that the Claimant was intoxicated on 15<sup>th</sup> February, 2016. That RWII did not leave his office but peeped through the window.
41. It is submitted that failure by the Respondent to recall the Claimant amounted to unfair termination of employment.
42. As regards entitlement to reliefs, it is urged that the Claimant is entitled to one month notice as she was not paid public holidays, service charge, house allowance pursuant to section 31 of the *Employment Act*, 2007 and outstanding leave as held by Mbaru J. in *Fancy Jeruto Cherop & another v Hotel Cathey Ltd* (2018 eKLR.
43. On overtime, it is urged that the Claimant worked 7 hours over and above the prescribed 8 hours and was thus entitled to overtime pay.
44. Finally, it is urged that the Claimant is entitled to compensation for unfair termination.

#### **Respondent's submissions**

45. As to whether termination of the Claimant's employment was unfair, the Respondent submitted that the Claimant's employment was not terminated as alleged. It is the Respondent's submission that the Claimant absconded duty without any reason.
46. The Respondent contends that the Claimant was guilty of various forms of misconduct including taking alcohol during working hours, cash shortages and selling own stock at the place of work in contravention of the provisions of section 44 of the *Employment Act*, 2007.
47. It is submitted that on 15<sup>th</sup> February, 2016, the Claimant came to the Manager's office in the company of others and hurled insults at the manager as confirmed by RWII whose office is adjacent to that of the manager.
48. That this conduct justified dismissal but the claimant was suspended and told to apologise, but did not and instead filed a suit.
49. The decision in *Augustino Mutwiri Murungi V United Millers Ltd* is relied upon to reinforce the submission that summary dismissal was justified.
50. Reliance is also made on the decision of *Kenya Power & Lighting Co. Ltd v Aggrey Lukorito Wasike* to underscore the applicability of section 43(2) of the *Employment Act*, that the respondent genuinely believed that it had a valid reason to terminate the claimant's employment.
51. It is the respondent's case that in summary dismissal, notice and compensation were not available.
52. As regards the reliefs sought, it is submitted that the Claimant is not entitled to any as her employment was never terminated and had been offered an opportunity to apologise after the events of 15<sup>th</sup> February, 2016.



53. The decision in *Ann Njoroge v Topex Petroleum Ltd* (2013) eKLR is relied upon to urge that the Claimant absconded duty and filed the instant suit.

### **Determination**

54. The issues for determination are;

- i. Whether termination of the Claimant's employment was unfair and unlawful or she absconded duty.
- ii. Whether the Claimant is entitled to the reliefs sought.

55. As to whether the Claimant deserted the workplace or her employment was unfairly terminated, the homeport is the law on absconding of duty as enunciated by courts.

56. The often cited *South African decision in Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA) stated 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 his or her post subsequently formulates the intention not to return.”

57. Relatedly, in *Felistas Acheba Ikatwa V Charles Peter Otieno* (2018) eKLR, the court held that;

“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.”

58. The court is guided by these sentiments.

59. It is common ground that the Claimant was an employee of the Respondent from 2009 as acknowledged by RWI on cross-examination.

60. It is also not in dispute that the Claimant had been on suspension before 15<sup>th</sup> February, 2016, the day she was supposed to have a meeting with RWI, the Manager. From the evidence on record, the court is satisfied that the Claimant came to the workplace on the afternoon of the material day and caused a scene at the manager's office by shouting and hurling insults at the manager. Strangely, the manager led no evidence of how she dealt with the allegedly unruly and intoxicated group.

61. RWII confirmed as much as he testified that he stood at the door of his office which is adjacent to that of the manager but did not intervene.

62. From the evidence, it is clear that the Claimant had not reported to the office for a cordial meeting but to embarrass the manager.

63. The Claimant alleged that she was dismissed from employment on this date and was not given a letter to that effect, an allegation the Respondent denies.

64. According to the Respondent, the Claimant was only suspended for 14 days and was to write an apology letter and a letter to that effect is on record.

65. The letter instructed the Claimant to keep away from the workplace during suspension.



66. Although the letter was dated 15<sup>th</sup> February, 2016, it was written after this date as it refers to the events of the date in past tense and was stamped 16<sup>th</sup> February, 2016.
67. It is unclear whether the letter was served upon and received by the Claimant. It has no acknowledgement and was not dispatched on email.
68. Although RWI alleged that she handed over the letter to the Claimant, she did not testify where and when she did so and there is no evidence that the Claimant returned to the place of work after 15<sup>th</sup> February, 2016 and there appear to have been no other communication from the Respondent until the suit herein was filed on 10<sup>th</sup> June, 2016.
69. If indeed the Claimant absconded duty as alleged, it was incumbent upon the Respondent to demonstrate the efforts it made to ascertain why she had not reported and issue a notice to show cause.
70. In *Judith Atieno Owuor v Sameer Agriculture and Livestock Ltd* (2020) eKLR, the court stated 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.”
71. The duty of the employer to demonstrate the efforts made to contact an employee who is alleged to have deserted duty was also emphasized in *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR and *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR.
72. In the instant case, the Respondent led no evidence to demonstrate that efforts were made to contact the Claimant after the alleged desertion.
73. For the foregoing reasons, the court is satisfied that the defense of desertion or absconding of duty is not sustainable in this case.
74. In *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, Ndolo J. stated as follows;
- “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
75. Contrary to the Respondent’s submission that the Claimant declined to attend a disciplinary meeting, the Respondent led no evidence that the meeting scheduled for 15<sup>th</sup> February, 2016 was a disciplinary meeting. Relatedly, an undated letter on record states that the Respondent was carrying out investigations on the alleged sale of alcoholic drinks from other places and the Claimant would be contacted when concluded “to outline our findings.”
76. There is no evidence of an investigation report or its findings nor an invitation to a disciplinary hearing.
77. Guided by the provisions of section 43(2) of the *Employment Act*, the court is satisfied that the Respondent may have had good reasons to terminate the Claimant’s employment but did not comply with the procedure prescribed by the provisions of section 41 of the *Employment Act*.



78. The Claimant's alleged behaviour on the afternoon of 15<sup>th</sup> February, 2016 justified summary dismissal under the provisions of section 44(4)(d) of the [Employment Act](#).
79. For the above stated reasons, it is the finding of the court that termination of the Claimant's employment by the Respondent was unfair.
80. On entitlement to the reliefs sought, the court proceeds as follows;

**a. One month's salary in lieu of notice**

81. The Respondent led no evidence of notice of termination. The Claimant is awarded Kshs.12,500/= as pay in lieu of notice.

**b. Public Holiday**

82. The Claimant led no evidence of the particulars of this prayer. Neither the written statement nor the oral evidence adduced in court make reference to the claim for public holidays.
- The prayer is declined.

**c. Service charge**

83. It is unclear to the court what this prayer refers to as no evidence was led to prove it or explain what it entails. The submissions make no reference to this prayer. The allegation that it refers to unremitted NSSF contributions for 2009 to 2010 is unconvincing as it is not 'service pay'.
84. There appears to have been confusion between service pay payable under section 35(5) of the [Employment Act](#), 2007 and service charge payable to employees working in hotels and other establishments as per the terms of the contract of employment.
- The prayer is declined.

**d. House allowance for 3 years**

85. The Respondent led no evidence to show that the Claimant was remunerated per day as a casual employee or her salary was inclusive of housing allowance as mandated by section 31 of the [Employment Act](#). In the absence of evidence that claimant's salary included housing allowance, the prayer for housing allowance at 15% of the basic pay for 3 years is awarded.

**e. Unpaid leave for 7 years**

86. Although leave is a statutory right of the employee, the claimant led no evidence why she did not proceed on leave for the entire duration of employment. The Claimant adduced no evidence to show that her request to proceed on leave was declined. The Claimant worked for the Respondent for 6 years 5 months.
87. More significantly, neither the written statement nor the oral evidence adduced in court make reference to outstanding leave days and how many they were. In the absence of essential particulars the prayer is declined.

**f. Overtime**

88. This prayer is based on the assumption that the Claimant worked for Respondent for 6.6 years from 8.30 am to 12.00 midnight every day she reported to the workplace which in the courts view is too theoretical in such a claim.



89. The Claimant adduced no evidence on the number of excess hours she worked for the Respondent. Finally, neither the written statement nor the oral evidence attest to the figures prayed for.
90. Although the court acknowledges that the Claimant may have worked late on some days, they could only be the exception not the rule and would thus be identifiable and reference should have been made to the nature of work and the timings. Evidence on record show that the respondent is a picnic site with other facilities such as Bar and butcheries. In the absence of particulars the prayer is declined.

**g. Compensation for unfair termination**

91. Having found that termination of employment was unfair for want of procedural propriety, the Claimant is entitled to the discretionary relief provided by section 49(1)(c) of the *Employment Act*. The Court is enjoined to exercise its discretion on the basis of the relevant circumstances as outlined in section 49(4) of the Act.
92. In this case, the court has considered the following:
- i. The Claimant was an employee of the Respondent for a duration of about 6 years, 5 months. The Claimant led no evidence to show that she wished to continue. She made no effort to contact the Respondent after 15<sup>th</sup> February, 2016.
  - ii. There are two warning letters on record and an undated suspension letter. The Claimant admitted having been on suspension and was scheduled to have a meeting with the manager on 15<sup>th</sup> February, 2016. The warning letters are clear that the Claimant had a challenge with reporting to work on time and disrespected supervisors among others. The two warning letters and a suspension within 6 months do not portray the Claimant as a diligent employee.
  - iii. Evidence on record show that on the afternoon of 15<sup>th</sup> February, 2016, the Claimant and other colleagues behaved irresponsibly at the workplace. Whether they were intoxicated or not, their behaviour was callous and uncalled for. Rudeness to the supervisor at the workplace and in the public eye cannot be a mark of civility. It is contemptible.
  - iv. The Claimant substantially contributed to the termination of her employment by the Respondent.
93. In light of the foregoing, the court is satisfied that the equivalent of two (2) month's salary is fair Kshs.25,000/=.

**h. Certificate of service**

94. The Claimant is entitled to certificate of service by dint of section 51 of the *Employment Act*, 2007.
95. In the end, judgement is entered for the Claimant against the Respondent as follows;
- a. One month's salary in lieu of notice  
Kshs.12,500/=
  - b. House allowance for 3 years Kshs.67,500/=
  - c. Equivalent of 2 month's salary Kshs.25,000/=
- TOTAL Kshs.105,000/=
- d. Certificate of service.



e. Costs of this suit with interest at court rates from the date hereof till payment in full.

96. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

