



**Khavesa v Mehta & another (Cause 482 of 2018)
[2022] KEELRC 13022 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 482 OF 2018
SC RUTTO, J
OCTOBER 28, 2022**

BETWEEN

SWEENE VUTARE KHAVESA CLAIMANT

AND

RAJIV MEHTA 1ST RESPONDENT

TANGERINE INVESTMENTS 2ND RESPONDENT

JUDGMENT

1. The claimant avers that she was employed by the 1st respondent as a domestic cook and received her salary from the 2nd respondent. She states that on July 11, 2017, she received a text message from the 1st respondent informing her that she would no longer be required to work on a fulltime basis but from time to time as and when required. The claimant has termed the 1st respondent's action as amounting to unfair and unlawful termination from employment. It is for this reason that she is seeking against the respondents, a sum of Kshs 580,800/= being one month's salary in lieu of notice, untaken leave days, unpaid house allowance and service /gratuity pay.
2. The claim is opposed with the respondents denying the claimant's averments and putting her to strict proof. The respondents have thus asked the Court to dismiss the suit with costs.
3. During the hearing on June 9, 2022, both parties tendered oral evidence in support of their respective cases.

Claimant's case

4. The claimant testified in support of her case and at the outset, adopted the statement of claim, her witness statement and the documents filed together with the claim, to constitute her evidence in chief. She further produced the said documents as her exhibits before court.



5. The claimant testified that she was employed by the 1st respondent with effect from June 14, 2014 and during the entire duration of her employment, she was never provided with a housing facility or paid house allowance in lieu thereof. That further, she never went on leave or paid in lieu thereof.
6. As regards her termination, the claimant testified that she received a text message from the 1st respondent on July 11, 2017 through which she was informed that she would no longer be required to work on a full time basis but from time to time as and when required and on part time basis. That since then, she never received any communication from the respondent on whether or when to report back to work. That she is aggrieved as she had done nothing wrong to warrant the drastic steps taken by her employer. She further stated that due procedure was disregarded prior to her dismissal.

Respondent's case

7. The respondents' side presented oral evidence through the 1st respondent who testified as RW1. He identified himself as one of the directors of the 2nd respondent. He also adopted his witness statement and documents filed on behalf of the respondent to constitute his evidence in chief. He further produced the said documents as the respondents' exhibits before Court.
8. RW1 stated that the claimant was never employed by the 2nd respondent and that he had made personal arrangements to have her salary paid by the 2nd respondent so as to avoid delays since he used to travel a lot. That there was therefore no contractual obligation or relationship between the claimant and the 2nd respondent.
9. It was his further testimony that the claimant started absconding duty and occasionally, would come to work late without any reason. That subsequently, he gave her several verbal notices and a written one on May 7, 2017, but she did not change her attitude. That he never terminated the claimant and challenged her to table the text message she alleges he sent her. He maintained that the claimant absconded duty for no reasons hence cannot implicate him when he had nothing wrong. That further, during the period he was away on travel, the claimant never used to work as there was no one left in his home.
10. In regards to the claim for house allowance, RW1 stated that the claimant's salary was inclusive of house allowance and she was aware of the same hence the reason for her failure to demand the same in the past. He further termed the claim for house allowance as an afterthought on the part of the claimant.

Submissions

11. It was submitted on behalf of the claimant that for any employee to be considered a deserter, he or she must for at least 7 days, fail to report to work for unexplained reasons. That the employer must establish that the employee has failed to return to work on their own volition. The claimant further argued that an employer who alleges desertion must therefore prove the efforts made to trace or confirm that the employee has deserted.
12. In further submission, the claimant stated that since she was never issued with a letter of employment, the presumption was that communication with the respondent was through text. That as such, this makes her assertion that she was dismissed vide a text message, valid. That further, she was never issued with a disciplinary letter or a text message to that effect.
13. On the part of the respondents, it was submitted that the claimant had failed to prove by way of evidence that she received a text message informing her that she will be not be required to work full time. That as sch, she had failed to fulfill the provisions of section 107 of the *Evidence Act*.



Analysis and Determination

14. Having considered the pleadings on record, the evidentiary material before me and the opposing submissions, the following issues stand out for resolution by the Court: -
- i. Whether the claimant absconded duty or was dismissed from employment
 - ii. If terminated, was the claimant's termination fair and lawful?
 - iii. Is the claimant entitled to the reliefs sought?

Abscondment of duty or dismissal?

15. It is the claimant's case that on 11th July, 2017, she received a text message from the 1st respondent informing her that she would no longer be required to work on full time basis but from time to time as and when required. That she never received received any communication from the 1st respondent on whether or when to report back to work. It is this alleged action by the respondent that the claimant has regarded as unfair and unlawful termination.
16. On the other hand, the 1st respondent contends that the claimant absconded duty. He further stated that the claimant was an errant employee who would abscond duty and at times, report to work late without any reason.
17. Evidently, the claimant's case revolves around the text message she alleges to have received from the 1st respondent on 11th July, 2017. This is her basis for alleging unfair termination. Be that as it may, it is notable that this message was not exhibited in court. Afterall, it was the smoking gun and her primary evidence. Why did she not produce the same? How is the court to believe her version of events?
18. As it is, and moreso in light of the provisions of section 47 (5) of the Employment Act, the claimant had the onus of proving that she was indeed terminated by the 1st respondent. I will reproduce the said provision thus:
- “(5) 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 of the termination of employment or wrongful dismissal shall rest on the employer.” Underlined for emphasis
19. In expounding the import of the above statutory provision, the Court of Appeal had this to say in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR: -
- “So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
20. In light of the above, it is apparent that the claimant has failed to discharge her burden by indeed proving that she was terminated through the said text message.
21. Further, and assuming that indeed the claimant received the text message as she has alleged, she does not state what her immediate response was. Ordinarily, if an employee was to receive such a message



from his or her employer, the logical thing to do, is to enquire on the import of the message or when he or she can report for duty next. The claimant only states that she took up the issue with her Advocate. With due respect, her version does not sound plausible.

22. In the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [supra], the court reckoned as follows:

“One may indeed wonder what the appellant did after the alleged termination of his employment. He certainly did not make any immediate protest in writing or at all, either to the respondent, the labour officer or even his workmate, John Elayesa Likhalmi who testified on his behalf. John testified that he only heard from undisclosed sources that the appellant had been dismissed. It was only in March 2012, more than five months later that the appellant’s lawyer addressed a demand letter to the respondents. Three more months later in June 2012, he filed the claim in the Industrial Court. This is hardly the conduct of an employee whose services were summarily and rudely terminated. On a balance of probability, he was not pushed. He jumped.”

23. Similarly, in this matter, I find that the conduct of the claimant after her alleged termination was rather odd. She does not even state or allude to the fact that she attempted to communicate with her employer after receiving the said text message. A prudent employee would have followed up with her employer to ascertain the import of the message or when she can resume duty.
24. Besides, it’s rather curious how she arrived at the conclusion that she had been terminated without receiving express communication from her employer to that effect.
25. The foregoing lends credence to the version by the 1st respondent that the claimant was not terminated from employment but rather, absconded duty.
26. The upshot of my findings is that the claimant has failed to discharge the burden under section 47(5) of the *Employment Act*, by proving that she was indeed terminated from employment.
27. Ultimately, I find that the claimant was not terminated from employment.
28. Having determined as such, it is not logical to determine the second issue as it falls by the wayside.

Reliefs?

29. The claim for compensatory damages and notice pay collapse, as the court has found that the claimant was not terminated from employment.
30. The claim for leave allowance is denied as the claimant has failed to particularize her claim and prove the specific periods when she claims to have been denied leave.
31. Regarding the claim for house allowance, the claimant stated that she was being paid directly through the bank. There was no pay slip exhibited to confirm a breakdown of her salary. This leads me to question how she came to know that she was not being paid house allowance, without a pay slip or contract of employment. Besides, her salary was above the relevant Minimum Wage Order for employees within her category. It is thus presumed that the house allowance was subsumed in her gross pay.
32. Finally, as regards the claim for service pay, the claimant admitted during cross examination that she was a registered member of the National Social Security Fund (NSSF). Subsequently, this places her within the ambit of the exclusions stipulated under section 35 (6) (d) of the *Employment Act*. As such, she is not entitled to service pay.



Orders

33. In the final analysis, I find that the claimant has not proved her case to the requisite standard hence I dismiss the claim in its entirety.
34. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Namada

For the Respondent Mr. Were

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

