



**Ondieki v Falcon Signs Ltd (Cause 156 of 2017)
[2022] KEELRC 12994 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12994 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 156 OF 2017
JK GAKERI, J
OCTOBER 26, 2022**

BETWEEN

LEAKEY MOKAYA ONDIEKI CLAIMANT

AND

FALCON SIGNS LTD RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on January 31, 2017, the Claimant avers that he was employed by the Respondent in October 2014 and performed his duties diligently.
2. That his monthly salary was Kshs17,000/= and was not paid housing and transport allowance as provided by law.
3. The Claimant further avers that in October 2015 while in the course of his employment, he fell from a ladder along Moi Avenue and was injured and was placed on medication and treated at the Mater Hospital and South 'B' Medical Centre. That the accident occurred due to the Respondent's negligence by inter alia providing defective ladder and failing to provide protective gear or provide a helper with the ladder.
4. That he was not compensated for the injuries.
5. It is the Claimant's case that after recovery, the Respondent failed to reinstate him on the ground that the absenteeism was intentional.
6. That the Respondent refused and/or neglected to pay the salaries for November and December 2015 or compensate the Claimant for the loss and pain as a result of the accident.
7. The Claimant further avers that the Respondent terminated his employment unlawfully.
8. The Claimant prays for;



- i. Kshs13,957.20 as medical expenses incurred.
- ii. Statutory dues.
- iii. Unpaid leave days.
- iv. One month salary in lieu of notice, Kshs17,000/=.
- v. 12 months' salary compensation, Kshs204,000/=.
- vi. General damages for mental suffering, publish embarrassment and anguish.
- vii. Interest at court rates.

Respondent's case

9. In its statement of defence filed on March 1, 2017, the Respondent admits that the Claimant was its employee at a salary of Kshs17,000/= per month.
10. It is the Respondent's case that it had a medical cover and the Claimant utilised the same and incurred no medical expenses when working for the Respondent.
11. The Respondent further avers that the Claimant absconded duty without notice. The Respondent denies that the Claimant was injured in the course of his employment. It avers that he proceeded on leave and his employment was not terminated.
12. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

13. Intriguingly, the Claimant's written statement dated January 16, 2017 which he admitted signing on the even date states that he was involved in a motor vehicle accident while in the course of his employment and sustained injuries and was placed on medication.
14. That he was treated at the Matter Hospital and South B Medical Centre.
15. That when he recovered and returned to work, he was not received back. The Claimant avers that his employment was terminated without a hearing.
16. In court, the Claimant testified that he was injured when he fell in the course of branding for Standard Chartered Bank Ltd. That when he fell, he was unconscious and found himself in Matter Hospital and paid Kshs13,600/=.
17. That he reported to work after 3 weeks of treatment.
18. On cross-examination, the witness confirmed that they were changing an advertisement banner when he fell.
19. The Claimant disclaimed Civil Suit CMCC 16575 of 2016, Milimani Commercial Courts between the same parties filed in 2016.
20. Strangely, when reminded about the statement, the claim confirmed that he was injured in a road accident. Relatedly, when reminded about the contents of the demand letter, the Claimant confirmed that it was a motor vehicle accident.
21. The witness testified that he was not given a termination letter and had no appointment letter.



22. That the letter dated December 18, 2015 allowed the Claimant to report back to the workplace.
23. On re-examination, the Claimant testified that he fell from a ladder along Moi Avenue in Nairobi.

Respondent's evidence

24. RWI, Mr. Patrick Mukeku, testified that the Claimant was his colleague at the workplace from 2014. It was his testimony that the Claimant did not report back to work after the injury and treatment. That the Claimant absconded duty.
25. On cross-examination, RWI stated that he was the Procurement Officer since 2015 and was unaware whether the Claimant's employment was terminated. That the Respondent had no Human Resource Officer but there was a Manager. That the Claimant was injured along Tom Mboya Street. He testified that he had no evidence of the Respondent's medical cover or that the Claimant proceeded on leave.
26. The witness testified that the Claimant absconded duty. He further testified that he was unaware of whether the Claimant was invited for a disciplinary hearing.
27. On re-examination, the witness stated that he was not present when the Claimant fell but confirmed that the Claimant worked for one (1) year.

Submissions by the claimant

28. The Claimant identifies six issues for determination ranging from where the injuries were sustained, whether the employer was culpable, nature of termination, remedies and costs.
29. As regards where the injuries were sustained, it is submitted that sometime in October 2015 while working along Moi Avenue, the Claimant fell from a ladder. The actual date of the fall is not indicated.
30. On whether the Respondent was negligent, it is submitted that it was in that the ladder was defective and the Claimant had not been provided with protective gear. Reliance is made on the common law duty of an employer to ensure the safety of employees by taking reasonable care. The decision in *Boniface Muthama Kavita v Carton Manufacturers Ltd* is relied upon to buttress the submission. It is the Claimant's case that the Respondent owed him a duty of care.
31. As regards termination of employment, the Claimant submits that he was not reinstated after the accident. Reliance is made on the provisions of the *Employment Act, 2007* to urge that the Respondent failed to prove that it had a valid reason to terminate the Claimant's employment or that it conducted the same in accordance with lawful procedure.
32. The decision in *Kenfreight (EA) Ltd v Benson Nguti* (2016) eKLR is relied upon to urge that the employee must be taken through a disciplinary process.
33. Reliance is also made on the decision in *David Gichana Omuya v Mombasa Maize Millers* (2014) eKLR.
34. The court is urged to find that termination of the Claimant's employment was unfair.
35. As to whether the Claimant is entitled to the prayers sought, it is submitted that he is.
36. On leave, the decision in *Rajab Barasa & 4 others v Kenya Meat Commission* (2016) eKLR is relied upon.



Respondent's submission

37. The Respondent isolates three issues for determination including costs.
38. On whether the respondent had reason to dismiss the Claimant summarily, reliance is made on section 44 (4) (a) and (c) of the *Employment Act* to urge that it was indeed entitled to do so since the Claimant absented himself from work without informing the Respondent. Reliance is made on the sentiments of Onyango J. in *Joseph Ouko Lwambe v Royal Garment Industries EPZ Ltd* (2018) eKLR.
39. It is the Respondent's case that it was under no obligation to keep the claimant on its payroll as he was not working.
40. On whether the termination of employment was lawful, reliance is made on the provisions of section 45 of the *Employment Act* to urge that the Claimant absconded duty. The decision in *Ann Njoroge v Topex Petroleum Ltd* cause 1248 of 2012 is relied upon to urge that a deliberate decision to desert work was a valid reason for termination of employment.

Analysis and determination

41. The issues for determination are;
 - i. Whether the Claimant was injured in the course of employment.
 - ii. Whether the Claimant absconded duty or his employment was unlawfully terminated by the Respondent.
 - iii. Whether the Claimant is entitled to the reliefs sought.
42. As to whether the Claimant sustained injuries while in the course of employment, the homeport is the evidence on record. Although the Claimant avers that he was injured along Moi Avenue when a ladder he was using slade and he fell, his statement on record which he did not disown state that he was involved in a motor accident sometime in October 2015. The demand letter dated March 14, 2016 too refers to a motor accident. Strangely, when the claimant was referred to these two documents by the Respondent's counsel, he admitted that he was involved in a motor vehicle accident.
43. Intriguingly, the doctors report and payment vouchers dated October 22, 2015 reveal that "the Claimant injured his chin, upper lip and tooth and had chest pain and left hand pain". He also had a deep cut across the chin. The medical report show that he was treated at 7. 20 p.m and discharged on the same day.
44. Puzzlingly, the claimant testified that when he fell, he became unconscious and found himself at the Matter Hospital. The doctor's report make no reference to the same. It is unclear as to who took the Claimant to hospital and from where.
45. It is the finding of the court that the Claimant's evidence on this issue is contradictory and unsafe to rely on.
46. RWI, Mr. Patrick Mukeku's evidence on the issue is also unhelpful. The witness was generally unaware of what transpired and relied on what he had been told by others. He testified that the Claimant fell on October 15, 2015 but had no evidence to show how the company was notified and how it addressed the issue. His evidence generally had no probative value.
47. The upshot of the foregoing is that the court is not satisfied that the Claimant has on a balance of probability demonstrated that he sustained injuries while in the course of employment.



48. As to whether the Claimant absconded duty as alleged by the Respondent or his employment was unfairly terminated, the parties have adopted opposing grounds.
49. *Black's Law Dictionary* 9th Edition defines desertion as
- “The wilful and unjustified abandonment of a person’s duties or obligations.”
50. In *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), a South African 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 his or her post subsequently formulates the intention not to return.”
51. The court is guided by these sentiments.
52. The evidence on record shows that the Claimant was attended to at the Mater Hospital on October 22, 2015 and at the South ‘B’ Medical Centre on November 5, 2015.
53. Relatedly, a letter from the South ‘B’ Medical Centre dated December 18, 2015 states that his tooth had been attended to on November 27, 2015 and could now resume duty. The letter is handwritten and has no designation of the signatory.
54. The Claimant alleges that when he reported to work after the injury, he was told that his employment had been terminated.
55. Puzzlingly, the Claimant does not disclose when he reported to work. If he did so, it was after December 18, 2015.
56. The Respondent’s witness, a procurement officer testified that the Claimant did not report back yet he was not the Human Resource Manager.
57. As explained by Onyango J. in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR;
- “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. Similar sentiments were expressed in *Simon Mbitshi Mbane v Inter Security Services Ltd* (2018) eKLR and *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR.
59. In this case, it was the duty of the Respondent to demonstrate the steps it took to ascertain the reasons why the Claimant was not reporting to work.
60. RWI testified that attempts by the supervisor to contact the Claimant fell through. The witness had no evidence to demonstrate when the supervisor called or who it was or the notice to show cause as a follow up.
61. The court is further guided by the sentiments of the court in *Judith Atieno Owuor v Sameer Agriculture and 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 have been a disciplinary process or notice issued prior to her termination. It is the duty of the Respondent to show this court it did accord the Claimant a fair hearing prior to her termination.”

62. In the words of Ndolo J. in Walter Ogal Anuro v Teachers Service Commission (2013) eKLR; “... For a termination of employment to pass a fairness test, there must be both substantive justification and procedural fairness.”
63. In the instant case, the Respondent adduced no evidence to demonstrate compliance with the provisions of the Employment Act regarding termination of the Claimant’s employment.
64. RWI confirmed that he was unaware of any invitation to the Claimant for a disciplinary hearing and provided no evidence of any proceedings. From the evidence on record, it is clear that the Respondent did not comply with the provisions of the Employment Act on termination of employment.
65. For the above stated reasons, it is the finding of the court that termination of the Claimant’s employment was unfair.
66. As regards the reliefs sought, the court proceeds as follows;

i. Kshs 13,957.29 as medical expenses

67. Having found that the Claimant did not demonstrate that he sustained injuries while in the course of employment as alleged, the prayer for medical expenses is not sustained and is declined.

ii. Statutory dues

68. The Claimant led no evidence of the particular dues demanded under this head and the amount claimed. The prayer is unproven and is accordingly declined.

iii. Unpaid leave pay

69. The Claimant testified he had not proceeded on leave for the duration he was an employee of the Respondent and although RWI testified that the Claimant took leave, he adduced no evidence of the application form and the number of days taken and when or payment *in lieu*. It requires no belabouring that leave is a statutory right.
70. The court is guided by the sentiments of the Court in Rajab Barasa & 4 other V Kenya Meat Commission (Supra) that “The employer must ensure each employee has taken annual leave when due or make payment in lieu thereof”.

71. The prayer for leave pay for the duration served is allowed.

iv. One month salary in lieu of notice Kshs17,000/=

72. Having found that termination of the Claimant’s employment was unfair for want of compliance with the provisions of the Employment Act, the Claimant is awarded one month’s salary, Kshs17,000/= in lieu of notice.



v. 12 months' salary as compensation for unlawful termination.

73. In light of the foregoing findings, the Claimant is entitled to the relief provided by section 49 (1) (c) of the *Employment Act*, 2007, subject to the court's discretion based on the factors outlined in section 49 (4) of the *Act*.
74. The court has taken into consideration that;
- i. The Claimant was an employee of the Respondent for a fairly short time, of about 1 year.
 - ii. The Claimant did not demonstrate his wish to continue working for the Respondent and did not appeal the employer's decision.
 - iii. The Claimant contributed to the termination of his employment by inter alia not reporting to the office or calling his supervisor for almost 2 months.
75. In light of the foregoing, the court is satisfied that the equivalent or one (1) month salary is fair, Kshs17,000/=.

vi. General damages for mental suffering, public embarrassment and anguish.

76. The Claimant adduced no evidence to establish this prayer. It is declined.
77. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms. The Claimant is awarded;
- a. One month's salary in lieu of notice Kshs17,000/=.
 - b. Leave days for the duration served.
 - c. Equivalent of one month salary compensation Kshs17,000/=
 - d. Costs of this suit.
 - e. Interest at court rates from the date hereof till payment in full.
78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH 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 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

