



REPUBLIC OF KENYA



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**Asava v Grish Kumar T/A Tejdip Hardware Ltd (Employment and Labour Relations Claim 109 of 2018) [2022] KEELRC 12759 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12759 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CLAIM 109 OF 2018**

**HS WASILWA, J  
OCTOBER 6, 2022**

**BETWEEN**

**SOLOMON ASAVA ..... CLAIMANT**

**AND**

**GRISH KUMAR T/A TEJDIP HARDWARE LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondents vide undated memorandum of claim filed on April 23, 2018, alleging to have been unfairly terminated and seeking compensation for the said termination. He therefore sought for the following reliefs; -
  - a. That a declaration be made to the effect that the Claimant's termination was unfair as the same was not within the ambits of the *Employment Act* and other employment laws.
  - b. That the Claimant herein be awarded 12 months' compensation for the unfair termination as provided for under section 49(c) of the *Employment Act*, of Kshs 278,301.84.
  - c. That the Respondent do pay the Claimant, one-month salary in lieu of notice amounting to Kshs 23,191.82
  - d. That the Respondent do pay the Claimant all the monies emanating from underpayment calculated under prayer (d) all amounting to Kshs. 980,906.38.
  - e. That the Court be pleased to order for payment of dues emanating from normal overtime which remain unpaid for the period of time the Claimant worked for the Respondent of Kshs 1,701,170.42.
  - f. Payment of dues emanating from off days/rest days of Kshs 1,075,649.18



- g. Payment of dues emanating from working on public Holidays which remain unpaid of Kshs 272, 953.64.
  - h. The Respondent herein pay the Claimant all the dues for his annual leave of Kshs 224,782.25.
  - i. Severance. Service pay calculated at 15 days of Kshs 160,558.75
  - j. Certificate of service.
  - k. Interest on all claims.
  - l. Costs of this case.
  - m. Any other relief that the Court may deem necessary to grant.
2. The Respondent entered appearance and filed a response to claim on the September 21, 2018 denying the claim and instead stating that the Claimant was not dismissed but that he absconded duty and left employment on his own volition, therefore the separation from employment was not unfair as alleged.

**Claimant's case.**

- 3. The Claimant states that he was employed on April 30, 2005 as a medium sized vehicle driver, earning Kshs 6,000 per month. This amount was enhanced to Kshs 10,000 on April 30, 2013.
- 4. He alleges that he reported to work every day at 8am and left the Respondent at 8pm clocking 12 hours, earning overtime which was never paid for.
- 5. According to the Claimant, the circumstances leading to the termination, is that on February 23, 2018, he was instructed by the Respondent to hand over the keys to the motor vehicle registration number KBH XXXV, which he used to drive and instead instructed to supervise repairs to motor vehicle registration number KAT XXX S, with a view of taking over the said vehicle. Upon conclusion of the said repair works, the Claimant was informed by the mechanic that the Respondent had directed him not to hand over the keys to the Claimant as he no longer worked for it.
- 6. The Claimant states that he sought audience of the Respondent on the turn of events to no avail forcing him to seek intervention of the Labour officer which did not bear fruits either. Upon termination, the Claimant was not paid any dues.
- 7. During pendency of his employment, the Claimant states that he worked on all public holidays. Also that he was not allowed to take his annual leave.
- 8. During hearing the Claimant testified as CW-1 and adopted his statement of April 23, 2018 and produced document in the list of April 23, 2018 as his exhibits. He added that he was terminated from employment when he was instructed to oversee repair work for motor vehicle KVH which was involved in an accident. The repair works took 3 weeks to complete but upon completion he was fired on allegation that he was old.
- 9. Upon cross examination by Kaviru advocate, the Claimant testified that he was introduced to the Respondent in 2005 by James Kibisu, a turn boy at the Respondent. He stated that the Respondent was transporting goods such as Unga and Steel for other people. He admitted that he worked on weekends up to 12 noon. On holidays he stated that he worked on normal days but at times he could be caught up on the road on holiday. He also admitted to writing the letter of 14/2/2016 and the one of 13/5/2015 though he stated that the vehicle was not damaged as alleged rather that the clips broke which Respondent deducted Kshs 2,000 from his salary for 6 months to pay for the said damage. He also denied the allegation that the motor vehicle KBH XXX V was ever involved in any accident. He



maintained that he did not leave work on his own. Also that the matter was heard by the labour officer who indicated that he should be paid and upon tabulating his claim and serving the Respondent, they refused to pay him his claim.

### **Respondent's case.**

10. The Respondent stated that contrary to the Claimant's claim, it employed the Claimant sometimes in April, 2013 not 2005 as alleged. His salary was Kshs 18,000 per month and the working duration was between 8am to 5 pm. This was informed by the fact that none of its driver is allowed to drive past 5pm.
11. It is the Respondent's case that the Claimant disappeared in 2019 for 9 months without notice and upon his return he begged the Respondent to re-employ him which the Respondent accepted but the Claimant did not change his ways and soon after employment he began transporting his own stuff using the company's vehicle. Consequently, the Respondent's customers complained of late deliveries that affected the Respondent's business with its customers.
12. The Respondent states that the Claimant's work ethics deteriorated that he caused an accident destroying goods worth Kshs 472,000 and the vehicle was repaired at a cost of Kshs 70,000. Further that in 2014, the Claimant delivered good to a wrong destination which goods were rejected by the customer and the Respondent incurred losses of Kshs 480,000 and another loss of two bales of unga costing Kshs 5100. It's alleged that due to this incident, the Claimant left employment for another 5 months and came back once again.
13. In February, 2018, the Claimant was allocated another vehicle which he was instructed to take it for service before use. Instead of acting on the instruction of the Respondent, the Claimant deserted employment without notice.
14. It is stated that during his employment, the Claimant had on various occasions admitted to his wrongdoing and even bound himself to reimburse the Respondent of the loss he had caused due to his actions.
15. The Respondent stated that, the issue before Court was raised before a labour officer however the Claimant failed to attend further hearing and rushed to this Court to litigate the issue before exhausting the issue at the labour offices.
16. He maintained that, it is the Claimant who absconded duty and therefore is the one that should compensate them for leaving employment without notice.
17. During hearing, Habel Wayoyi, the Respondent's supervisor testified as RW-1 and adopted his witness statement of October 16, 2018. In addition, he testified that the he was employed in 2008 and the Claimant was employed in 2013. He stated that the Claimant was tasked with transporting goods for the Respondent which work was not available at the time as such the Claimant could be free until work is available. He stated that the Respondent's employees did not work on Sundays and during holidays.
18. He testified that the Claimant was a difficult employee, who deserted work on several occasions. He testified that the Claimant caused an accident in 2013 and left employment only to come back in 2014 to ask for forgiveness. He stated that the vehicle which was involved in an accident was repaired for Kshs 70,000. Upon his return in 2014, he worked well until later on when he delivered goods to wrong customer and in the process lost two bales of Unga, that the Claimant admitted to his mistake and offered to pay for the same. That sometimes between 2015 and 2016 the Claimant abandoned work after delivering goods to a wrong customer and admitted to that fact and sought for forgiveness and in response the Respondent offered him another vehicle which he refused and abandoned work and



reported the issue to labour office where a cheque of Kshs 40,000 was given to him but he rejected and filed this suit.

19. Upon cross examination by Mburu Advocate, the witness testified that they keep employment record and indeed that the Claimant was employed in April, 2013 and not 2005. He stated that the Claimant absconded work in 2014 and resurfaced in 2015. He testified that the Claimant was earning Kshs 10,000 which was increased to Kshs 15,000 in 2016. On being tasked to produce documents of the said payments, the witness testified that they lost documents such as the muster roll, while moving to a new office. On leave pay, the witness testified that the Claimant never worked continuously for a year as such is not deserving of leave or pay thereof. He testified also that he was a member of NSSF thus not deserving of severance/ service pay. He admitted that no disciplinary action was taken against him because he absconded duty. On the damaged vehicle, the witness admitted that these was insured but the insurance refused to pay which resulted to the Claimant offering to pay, informing the deductions of Kshs 2,000 per month.
20. On re-examination, the witness testified that that the pay rise was effected in 2016 from Kshs 10,000 to Kshs 16,000. He also maintained that the Claimant was NSSF and NHIF paid member.

### **Claimant's Submissions.**

21. It was submitted for the Claimant that he was employed in April, 2005 as has been consistently stated by him in the pleadings and his examination in chief. The Respondent on the contrary was inconsistent as he alleges in his pleading that the Claimant was employed in 2013 on a salary of Kshs 18,000 only to change the narrative during hearing that the Claimant was paid Kshs 10,000 which was enhanced to Kshs 15,000 in 2016. From the foregoing the Claimant submitted since there is variance on the date of employment and salary paid, the Respondent, being the employer, is the one tasked to give evidence on the said issue since they are the record keepers as envisaged under section 10(7) of the *Employment Act*. To further support his argument, he relied on the case of *Paul Wafula v Century Feeds Limited* (Cause 186 of 2018) [2022] KEELRC 1327 (KLR) (13 July 2022) (Judgment), where the Court held that;

“The failure by the Respondent to reduce the relationship into writing and its failure to keep records of employment cannot be visited upon the Claimant and hence this Court is in full concurrence with Counsel of the Claimant who cited *Caroline L. Musonye v Panari Hotel Ltd* (2017) eKLR to drive this point home.”

22. On whether the termination was unfair, it was submitted that the Claimant was consistent in his testimony that his services were terminated when he was asked to oversee repair to motor vehicle registration number KAT XXX S with a view to taking it over only for the Respondent to refuse to give him the keys to the said vehicle. It was argued that the Respondent's argument that the Claimant absconded duty is not plausible and in fact is in violation of the *employment Act* since there was no action taken by the Respondent to ascertain the whereabouts of the Claimant. Furthermore, that the termination was not based on any justifiable reason, neither was the Claimant subjected to due process as envisaged under section 41 and 43 of the *Employment Act*, therefore that the termination was unfair as provided for under Section 45 of the *Employment Act*. To support its case, he relied on the case of *Stanley Omwoyo Onchwei V Board of management Nakuru YMCA Secondary School* [2005] eklr where the Court held that;

“The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbors or family members), issuance of ultimatums to the employee to



resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for now.”

23. He also relied on the case of *Evans Ochieng Oluoch V Njimia Pharmaceuticals Limited* [2016] eKLR where the Court held that;

“An employer relying on the ground of desertion of duty to justify a termination of employment must show that efforts have been made to get in touch with the deserting employee. At the very least, the employer must issue reasonable notice to the employee that termination of employment is being considered.”

24. On the reliefs sought, the Claimant submitted that, it has established his case to the required standards and urged this Court to allow the claim as prayed.

### **Respondent’s Submissions.**

25. The Respondent on the other hand maintain that the Claimant was employed in April, 2013 and not 2005 as alleged. It was argued that the Claimant is the one tasked with exhibiting evidence to support his case envisaged under section 47(5) of the *Employment Act*, therefore that the allegation that he was employed in 2005 ought to have been supported by evidence.
26. On whether he was unfairly terminated, it was submitted that the Claimant abandoned work in February, 2018 after he was allocated a new vehicle to service and use it and therefore that he is the one that should have issued notice of termination and not the other way round as seen in Section 35 of the *Employment Act*.
27. The Respondent concluded that the claimant has failed to discharge the burden of proving its case on a balance of probability as such is not deserving of the reliefs sought.
28. I have examined all evidence and submissions of the parties herein. The employment of the Claimant by the Respondent is not disputed. However, the contention is at the time when the Claimant was employed.
29. The Claimant insisted that he was employed in 2005 and the Respondents aver that he was employed in 2013. There is however no evidence submitted before Court by either party as to the correct time the Claimant was employed.
30. The Claimant submitted that he was paid 10,000/= as at the time of termination. The Respondents on their part averred that the Claimant was being paid 18,000/= per month as per the pleadings and 15,000/= in their evidence in Court. Despite the 2 unagreed issues, it is still true that the Claimant worked for the Respondent and left in 2016. He avers that he was terminated whereas the Respondents insist that he absconded duty.
31. Though the Respondents aver that the Claimant absconded duty, there is no evidence that they sought out the Claimant. The Claimant reported a dispute at the labour office and the labour office summoned the Respondent to a meeting on 12/3/2018. If indeed the Claimant had absconded duty the Respondent ought to have served him with a show cause letter and subjected him to a disciplinary hearing for absenteeism. This was never done.



32. Despite the Claimant working for the Respondent for periods of over 3 months, the Respondent also failed to issue him with an appointment letter detailing his salary as per Section 9(1) of the Employment Act, 2007 which states as follows;

General provision of contract of service

A contract of service—

- (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
- (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.”
  - (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
  - (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months,

33. Given the controversy on his salary, I refer to Section 10 (7) of the Employment Act 2007 which envisages that the burden of proving or disproving what was a payable rests on the Respondent. Section 10 (7) of Employment Act 2007 states as follows;

“10(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

34. The Claimant has indicated that his salary was 10,000/= and I will go with this position.

35. In the circumstances of the case, I find that the Claimant was dismissed from work unfairly and unjustly without establishment of valid reasons and subjecting him to a fair disciplinary process as stated under Section 45 (2) of the Employment Act 2007 which states as follows;

“45. (1).....

- (2) A termination of employment is unfair if the employer fails to prove-
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason-
    - (i) related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”



36. In terms of remedies, I find for the Claimant and I award him as follows;

1. Underpayment of salary between 2015 to 2018 the rest of the period being time barred.  
= 231,697.80 + 131,918.20 as pleaded = 363,615.20/=
2. 1 month salary in lieu of notice = 23,191.82/=
3. 8 months salary as compensation for unfair and unjust termination = 8 x 23,191.82 = 185,535/  
=
4. Annual leave for the year 2017 to 2018 = 23,191.82  
TOTAL = 595,533.84/=  
Less statutory deductions
5. Issuance of a certificate of service
6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mburu S.K. for Claimant – present

Maina for Respondent – present

Court Assistant – Fred

