



REPUBLIC OF KENYA



KENYA LAW
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**Nyambarora v Robinsons Investment Limited (Cause 288 of 2016)
[2022] KEELRC 12755 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12755 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 288 OF 2016
HS WASILWA, J
OCTOBER 6, 2022**

BETWEEN

JOB ONYIKWA NYAMBARORA CLAIMANT

AND

ROBINSONS INVESTMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his memorandum of claim on the August 2, 2016, claiming to have been unfairly terminated and seeking for the following reliefs;
 - a) A declaration to the effect that the Claimant's termination was unlawful, unjustified as the same was not within the ambits of the Employment Act, 2007 and other employment laws.
 - b) The Claimant be awarded 12 months compensation for the unlawful and unjustified termination as provided for under section 49(c) of the employment Act.
 - c) One-month salary in lieu of Notice of Kshs 13,029.62.
 - d) Underpayment from November 10, 2011 to June 30, 2015 amounting to Kshs. 197,891.91.
 - e) Overtime pay of Kshs 542,074.22.
 - f) Off days/ rest days dues of Kshs 309,756.69.
 - g) Illegal deductions made on his salary in the month of February, March and June, 2016 of Kshs 20,541.86.
 - h) Leave pay for the 4 years, 5 months worked of Kshs.46,095.69.
 - i) Uniform refund of Kshs 3,600.
 - j) Certificate of service.



- k) Costs and interests on the all the Claimant listed.
- l) Any other relief the Court may deem necessary to grant.
2. The Claimant states that he was employed by the Respondent on November 10, 2011 as a night watchman earning a salary of Kshs 6,500, which was increased to Kshs 7,000 in July, 2013, Kshs 7,500 in October, 2014 and Kshs 8,500 in January, 2015, a pay which he earned till his termination on July 15, 2016.
 3. He stated that throughout his employment he reported to work at 6pm and clocked out at 6am every day of the week without any rest day earning overtime which was never paid for. He added that he worked on all public holidays and was not granted leave as provided for under the *Employment Act*.
 4. The circumstances leading to his termination, is that on the July 15, 2016, he was asked by the management to surrender his old uniform in order to be issued with a new one. The clamant states that he surrendered his uniform save for the boots, cap and belt which were still new and since the cost of the said uniform was to be deducted from his salary he did not see the need to get a new uniform when the older one was still in good condition.
 5. He states that the Respondent insisted on giving him new uniform and reiterating that the uniform price would be deducted from his salary whether he took the new one or not. The Claimant states that he stood his ground and insisted to take only uniform without boots, cap and belt. This action angered the Respondent's manager and he immediately fired him and ordered him to clear from the premises.
 6. He sates that he was abruptly terminated without any reason, notice or disciplinary hearing contrary to the dictates of the *Employment Act*.
 7. The Claimant avers that during the pendency of his employment, the Respondent made illegal deduction on his salary in the month of February, March and June 2016 of Kshs 5,724, Kshs 4,233 and Kshs 4,590 respectively, which monies have not been refunded to date. Further that upon termination, the Claimant was also not paid Kshs 3600 being uniform refund.
 8. The Respondent entered appearance on 6th October, 2016 and filed their response on the March 6, 2017. In the said Memorandum of response, the Respondent admits to employing the Claimant in November, 2011 but that the Claimant deserted employment in July, 2016.
 9. The Respondent states that prior to deserting work, the Claimant had received several warning letters on account of absenteeism, insubordination and sleeping while at work. He was also served with a warning letter for fighting with his colleagues at work.
 10. It is states that, the Respondent would from time to time issue new set of uniforms to its employees but that the Claimant failed to surrender his old uniform claiming that it was still new and instead deserted duty.
 11. It is states that the Claimant subordinated his superiors when he refused to attend a mandatory security parade without any excuse. Further that he exchanged words with the Respondent manager over the return of the said uniform.
 12. The Respondent alleged that the Claimant conceded to some of his misdoing and even apologized vide the letter of December 28, 2012 and vowed to change his behavior.
 13. The Respondent maintained that the Claimant filed this suit to get what he is not entitled to and avoid earning an honestly living.



14. With regard to the reliefs sought, the Respondent states that since the Claimant deserted work it was impossible for them to issue him with a notice of termination. On the leave pay claimed, the Respondent states that the Claimant never at any point worked continuously for 12 months as such not entitled to leave pay, instead that he would desert work from time to time for instance that he deserted work in November and December, 2012, worked for only 3 months in the year 2014, absconded work in July till September, 2015 and finally deserted in July, 2016 never to report back.
15. The Respondent states also that it paid the Claimant Kshs 7,700 being unpaid salary on the 18/5/2016 and insisted that the Claimant is not entitled to any overtime pay since he worked from 8am to 6 pm. Additionally that the Claimant did not work on any public Holiday as alleged.
16. The Respondent states that the Claimant has filed this suit prematurely without referring it to the labour office as such the same ought to be struck out with costs to the Respondent.

Hearing.

17. The Claimant testified as CW-1 and adopted his statement of 2/8/2016 and produced documents marked as Exhibits 1 to 4 respectively. He testified, in addition, that the minutes produced by the Respondent is not authentic as they show that the Claimant did not attend work several days which was not the correct position. He admitted that the letter of December 24, 2012 and December 28, 2012 were his and he was on sick leave. He however denied the petty cash vouchers of 18/5/2016 showing payment of Kshs. 7,000 claiming that he did not received such money and the signature on the voucher is not his.
18. Upon cross examination by Oseko Advocate, the Claimant testified that he was employed in November, 2011 on a salary of Kshs 6500 which he was paid. He denied being absent on several occasions as alleged or sleeping at worked. He denied insulting any colleague or losing his uniform as alleged. He testified that he did not return; shoes, belt and cap because they were still new and could not afford to buy new ones when they older ones were still in good shape.
19. Upon further cross examination, the witness testified that he was only absent in December, 2012 on sick off. He also stated that they never used to sign any muster roll, therefore that the muster roll produced is not authentic. He stated that he does not know Vincent Wambire. That James was his immediate supervisor and Joram was employed after he had left the Respondent employment.
20. On re-examination, he testified that the warning letter exhibited as defence document number 1 was issued after he had been dismissed. He also confirmed that the letter and muster roll do not tally.
21. The Respondent's director, Ms. Agnes Mukami testified as RW-1 and adopted her statement filed in Court on 14/3/2017. The witness testified that the Claimant had initially been absent from work on several occasions and he even wrote to the Respondent promising not to abscond work again but reneged on his word and deserted employment once again in July, 2016 and never reported back to work. She maintained that the Claimant was not terminated but deserted employment. She testified further that the Claimant refused to take his new uniform and retained his old uniform contrary to the Respondent's rules, when it was practice to change the guards uniform after some time. It was her testimony that the Claimant attacked the manager when asked to return the old uniform which act was a consideration for termination from work.
22. She testified further that that the Claimant was paid Kshs 7,700 for days worked in March, 2016. She admitted that the Claimant did not take leave because he was a casual employee. She also stated that the Claimant did not work on Public Holidays. She admitted that the Claimant was not refunded Kshs 3,600 because he had not returned his uniform to date.



23. Upon cross examination by Mburu Advocate, the witness testified that they have 20-40 employees in the Respondent's employ whose records are kept by the Respondent. She testified that the Claimant was employed in November, 2011 and worked on availability of work basis as a guard either on night or day shift. She stated that the Claimant would desert work but could not list the days the Claimant deserted work. She testified that the Claimant was paid daily wages which was accumulated and paid via petty cash or through the bank on weekly basis or on monthly basis but could not tell the amount paid to the Claimant on daily basis. She admitted that the Claimant was not paid any House allowance. She stated that there are three shifts of 8 hours each starting from 8am to 5pm and another from 9pm to 6am.
24. Upon further cross examination, the witness testified that the warning letter of 7/7/2016 shows that the Claimant was absent from work from 25/6/2016 to 5/7/2016 but the muster roll shows he was present on 2nd, 3rd, 4th and July 5, 2016. She quickly corrected it and stated that the muster roll was erroneous. The witness testified that the Claimant did not work on public holidays but on being shown the muster roll that showed he worked on June 1, 2016 she testified that the Claimant was paid for that particular day. She testified further that the Claimant worked for 6 days in the month of February, 2016 a demonstration that he was not working continuously for the Respondent but dependent on availability of work.
25. On re-examination the witness testified that the Claimant was paid on the number of days worked in a month therefore the pay for each month varied. She also testified that the Claimant was not issued with a certificate of service because he did not clear with the Respondent.

Claimant's Submissions.

26. It was submitted for the Claimant that the Claimant's employment began in November, 2011 till July 15, 2016. It was argued that the Claimant's employment shifted from that of a casual employee to that of a permanent employee as provided for under section 37 of the *Employment Act* because the Claimant worked continuously throughout his employment and was paid on a monthly basis as testified by the Claimant. It was further argued that, the Respondent ought to have demonstrated contrary information by way of evidence as provided for under section 107 of the *Evidence Act* since they are the ones tasked with keeping employees records. To support its case they relied on the case of *Mark Ngaira Ibochio V World Class Cities Ministries Nakuru*, Nakuru ELRC case number 166 of 2018(UR).
27. It was also submitted that the evidence in form of muster roll produced by the Respondent to demonstrate he allegation of desertion was full of inconsistencies and RW-1, during cross examination, disowned it, an indication that the evidence before Court is not to be relied on.
28. On whether the Claimant was unfairly terminated, it was submitted that the Claimant was unceremoniously terminated when he refused to surrender his older uniform and receive a new one. He argued that the Claimant refused to receive the new uniform because his older uniform was still in shape and also that since the new uniform was given at a cost, he was not ready to pay for another uniform when the other one was still in good condition, therefore the reason for refusing to accept a new uniform is justified in the circumstances.
29. The ground for termination according to the Respondent was on the basis that the Claimant was an habitual absentee and a warning letter indicated that he had been absent from 25/6/2016 to 5/7/2016 was exhibited in Court however the muster roll produced indicated that the Claimant was at work on 2nd, 3rd, 4th and July 5, 2016. This Muster Roll though denounced by the Respondent's witness indicated a contrary evidence on the allegation of absenteeism. The Claimant on that basis submitted



that the allegation that the Claimant deserted work is far from the truth since the Respondent's evidence showed that the Claimant worked till July 14, 2016, as such the allegation that the Claimant deserted work is not justified and the allegation by the Claimant that he was fired on July 15, 2016 on refusing to accept new uniform is the more plausible reason and therefore that the termination was unfair having been done without notice or disciplinary hearing.

30. It was argued that even if the Claimant deserted work, the Respondent was tasked with demonstrating efforts taken to reach out to the employee and find out the reason for desertion as was held in *Stanley Omwoyo Onchweri V Board of management Nakuru YMCA Secondary School* [2005] eklr and the case of *Evans Ochieng Oluoch V Njimia Pharmaceuticals Limited* [2016] eklr.
31. In conclusion the Claimant submitted that they have demonstrated a case in favour of the Claimant and prayed that the Claimant be allowed as prayed.
32. I have examined all the evidence and submissions of the parties herein.
33. It is the Claimant's case that he was employed by the Respondent from November 10, 2011 to July 15, 2016 a period of about 5 years.
34. The Respondents in their evidence admitted to employing the Claimant in the period stated only that it was on casual basis.
35. The Claimant has further indicated that he was terminated by the Respondent's Manager who had insisted he return the old uniform and which the Claimant indicated was not old and still usable. This angered the Respondent who fired him on the spot.
36. The Respondents on their part aver that the Claimant absconded duty in July 2016.
37. There is no any evidence that the Claimant was however subjected to any disciplinary action for absenteeism from work after the alleged abscondment. No notice was even issued to him and there is no evidence of the efforts made by the Respondent to trace him after the alleged abscondment.
38. Section 41 of the *Employment Act* states as follows;-

"41 Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".

39. Indeed no employee should be condemned unheard.
40. It is also the duty of the employee to establish validity of reasons for terminate as envisaged under Section 43 of the *Employment Act* 2007 which states as follows;-

"43. Proof of reason for termination



(1) In any claim arising out of termination of a contract, the employer shall be required 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

41. There is no fact put to the validity of reasons for the dismissal and I therefore find the Claimants dismissal unfair and unjustified as per 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”.

42. It is therefore my finding that this claim is resolved in favour of the Claimant and I award him as follows;

1. 1 month salary in lieu of notice = 13,029.62/=

2. Deductions made from Claimants payslip = 20,541/=

3. Uniform refund of kshs.3,600/=

4. Compensation equivalent to 10 months’ salary for unfair dismissal = 10 x 13,029.62 = 130,296/=

5. Underpayments of kshs.197,891.91 as pleaded

Total = 365,358.53/=

Less statutory deductions

6. The Claimant be issued with a certificate of service

7. 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 6TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:

Mburu S.K. for Claimant – present

Githiru for Respondent – Absent

Court Assistant – Fred

