



**Ayiemba v Jepco Services and Renovators Ltd (Cause 2037 of 2016)
[2022] KEELRC 13265 (KLR) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2037 OF 2016
BOM MANANI, J
NOVEMBER 23, 2022**

BETWEEN

SALINE APONDI AYIEMBA CLAIMANT

AND

JEPKO SERVICES AND RENOVATORS LTD RESPONDENT

JUDGMENT

1. This is a claim for compensation for alleged wrongful termination. By the action, the Claimant seeks for a court order affirming that the Respondent acted contrary to the law in terminating her services and is liable to pay her damages and other reliefs as pleaded in the Statement of Claim.
2. The Claim is resisted by the respondent. The Respondent denies having terminated the Claimant's services as alleged or at all.

Claimant's Case

3. According to the claimant, she was employed by the Respondent in November 2011. Her work involved providing cleaning services to the Respondent's clients.
4. The Claimant avers that she served the Respondent diligently until 11th of February 2016 when she was summarily terminated. That before her termination, the Respondent did not afford the Claimant an opportunity to be heard in defense of the allegations against her. It is her case that her termination violated the rules of natural justice.
5. During her term of service with the Respondent, the claimant contends that she was not provided with housing. And neither was she paid house allowance. She also alleges that she was not allowed to take leave and her accrued leave dues remain outstanding. Consequently, the Claimant has prayed for the several reliefs set out in her Statement of claim.



Respondent's Case

6. The Respondent admits having engaged the services of the Claimant as pleaded by the Claimant. However, it is the Respondent's position that during the course of her service, the Claimant violated the duty on employee loyalty when she began working for the Respondent's competitor.
7. It is the Respondent's case that when it was discovered that the Claimant was serving a competitor, she was asked to account for this misconduct but failed to do so. Meanwhile, the Respondent says that it relocated the Claimant to a new station in an effort to minimize her contact with the competitor.
8. According to the Respondent, instead of the Claimant reporting to her new station, she absconded from duty. The Respondent asserts that the Claimant was not terminated as alleged by her. Rather, she voluntarily relinquished her employment through her act of desertion.

Issues of Determination

9. From the pleadings, evidence tendered and submissions by the parties the following are the issues for consideration:-
 - a. Whether the Claimant was unlawfully terminated or lost employment through desertion.
 - b. Whether the Claimant is entitled to the reliefs sought.

Analysis and Determination

10. I have considered the evidence and submissions by the parties. I will analyze the foregoing issues in the light of the said evidence, submissions and the applicable law.
11. The evidence by the parties reiterates their respective positions in their pleadings. I will therefore not rehash the evidence here.
12. Whilst the Claimant asserts that her employment was summarily terminated on 11th February 2016, the Respondent avers that the Claimant absconded from duty and was never terminated. The court must therefore determine whether the separation of the disputants was through summary termination or desertion of duty.
13. I have considered the parties positions on this matter against the documentary evidence that has been tendered. In particular, I have considered the letter by the Respondent to the Claimant dated February 12, 2016. In this letter, the Respondent required the Claimant to give reasons why her services should not be terminated. The Claimant was required to furnish the Respondent with these reasons within one day of receipt of the letter. My understanding of this communication is that the Respondent was communicating its position to terminate the Claimant if she failed to satisfactorily account for her alleged misconduct within one day of that letter.
14. There is no indication that the Claimant reacted to the letter. At least none of the parties testified on whether the Claimant responded to the letter under reference. Inevitably, the failure by the Claimant to react to the letter triggered the next course of action by the Respondent as asserted in the letter: termination of the Claimant.
15. Although there is variance in the date of the letter and the date the Claimant indicates that the termination occurred, I note that the variance is by a day. It is therefore reasonable to hold that the termination happened around the time alluded to in the letter and the evidence by the Claimant.



16. But even if it were to be assumed that the Claimant deserted duty as suggested by the Respondent, it is now settled that an employer must take certain steps to close the contract of service of a deserting employee. These include the employer making deliberate effort to find out the whereabouts of the employee and issuing him with the requisite notice to show cause why he should not be terminated for failing to report to work (see *William Gituma Gateere v RAA Limited* [2020] eKLR and *Milano Electronics Limited v Dickson Nyasi Mubaso* [2021] eKLR).
17. There is no evidence to show that the Respondent subjected the Claimant to the above process. Much as the Respondent may have had good cause to consider terminating the Claimant for working for a competitor, it is clear to me that the separation of the parties was not processed in the manner contemplated in law. I will therefore declare that the Claimant was unfairly separated from the Respondent.
18. Having found as such the next question relates to the reliefs to be granted to the Claimant. Although the Claimant has prayed for several reliefs, I am guided by the provisions of section 49 of the *Employment Act* in making my decision on which of these remedies to grant.
19. The court has discretion to award any of the reliefs specified under the said provision of statute. However, this discretion must be guided by the principles set out in the said section of law. For instance, the court is required to consider the extent to which the conduct of the Claimant led to her termination.
20. I note from the evidence that the Claimant was indeed serving another employer whilst she was in the Respondent's employment. This is evidenced in the letter produced by the Respondent dated March 2, 2016. It shows that the Claimant had, since 2014, been working for a company by the name Cebeth Enterprises Ltd which was also involved in the provision of cleaning services. Such conduct made nonsense of the Claimant's obligation to be loyal to the Respondent.
21. The Claimant's counsel has made a last minute attempt to discredit this letter. It is his position that since the letter was not produced by its maker, its probative value is reduced. That the court should ignore it altogether. I do not agree with this assertion. At the time of production of the letter as evidence, the Claimant raised no such objection to it. Therefore, the objection raised through his submissions comes too late in the day.

Award

22. Taking the fact of the Claimant's disloyalty to the Respondent into consideration, I am minded not to reward a party who was herself in breach of her contract of service by awarding her handsomely. I will therefore award the Claimant global compensation that is equivalent to her salary for five months totaling Ksh. 40,000/=.
23. I award the Claimant interest on the aforesaid award to run at court rates from the date of judgment till payment in full.
24. The award aforesaid is subject to the applicable statutory deductions as directed under section 49 of the *Employment Act*.
25. I award the claimant costs of the suit.
26. I order that the Respondent issues the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF NOVEMBER, 2022



B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

