



**Keter v Mwangi t/a Nairobi Chips Hotel (Cause 379 of 2017)
[2022] KEELRC 13412 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 379 OF 2017
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

JOHN KETER CLAIMANT

AND

THUKU MWANGI T/A NAIROBI CHIPS HOTEL RESPONDENT

JUDGMENT

1. The claimant herein filed his memorandum of claim dated December 8, 2017 seeking for compensation for unlawful termination against the respondent.
2. He averred that he was employed as a waiter by the respondent sometimes in September 2009 at a salary of Kshs 9,000 per month
3. He stated that he worked diligently until May 2017 when the respondent without any reasonable cause nor notice terminated his services verbally.
4. The respondent filed his reply on February 22, 2018 where he admitted that the claimant was his employee for the period between September 2009 and May 2017 but denied the claim.
5. The respondent averred that the claimant was not a reliable employee and had a tendency of absconding duty. It was his contention that the claimant went for his annual leave in May 2017 but never returned.
6. According to the respondent, the claimant deserted his duties without any justifiable cause and is therefore not entitled to the reliefs he is seeking.
7. The matter was set down for hearing



The Evidence

8. CW1, John Keter, the claimant, gave evidence on April 20, 2022. He substantially reiterated the matters raised in the statement of claim. He stated that he was employed by the respondent sometimes in September 2009 and was earning Kshs 9,000 and in May 2017 he was given a one month leave and going back to his job, he was told by the respondent that he would be called back.
9. It was the claimant's contention that he was never called to go back to work. He stated that he was not given a termination letter nor paid his terminal dues. He maintained that during the course of his employment with the respondent he never went on leave save for June 2017.
10. According to the claimant, the muster roll was used for payment of salaries and that they never used to sign in or out and only signed the muster roll when paid salaries. He also stated that he had registered for National Social Security Fund
11. On cross examination, he stated that he was paid salary for May 2017 before he proceeded on leave in June. He maintained that he resumed at the end of June but the respondent informed him to go back home as the work had reduced
12. On re-examination, he reiterated that he started his leave on May 30, 2017 and resumed on June 30, 2017 where he was asked by the respondent to go back home as work had reduced and that he would be called back.
13. RW1, Thuku Mwangi, the respondent testified on June 7, 2022 and confirmed that the claimant was employed as a waiter in his hotel in 2009 where he worked until May 2017.
14. According to RW1, the claimant took leave in June 2017. The respondent continued to remit his NSSF pay until November when they stopped. He maintained that he did not terminate the claimant's employment and as such, he is not liable to pay the claimant as he absconded duty.
15. On cross examination, RW1 conceded that he never issued the claimant with a show cause letter after he absconded duty because he did not have his contacts. He also stated that the claimant used to go on his leave days every year although he conceded that he did not have the records to confirm that position. RW1 stated that his premise is very small hence he did not keep a lot of records
16. With that evidence, the court directed parties to file written submissions. The claimant filed his submissions on July 8, 2022 whereas the respondent filed his submissions on July 26, 2022.

Determination

17. I have considered the pleadings, the evidence of the parties and the submissions on record including the cited authorities. In my view, the issues for determination are:-
 - i. Whether the claimant's employment was terminated by the respondent.
 - ii. Whether the termination was unfair
 - iii. Whether the claimant is entitled to the reliefs sought in the claim.
18. On the first issue, the claimant has averred that he went on leave in June 2017 and that on going back to work, he was told to go back and that he would be called back.
19. The respondent on the other hand as urged this court to dismiss the claimant's claim on the ground that the claimant's employment was not terminated unfairly but that he absconded duty



20. This court when dealing with a similar issue in the case of *Simon Mbitshi Mbane v Inter Security Services Ltd* [2018] eKLR, held

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

21. Similarly, in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J observed as follows;

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”

22. RW1 when giving evidence in court stated that he did not reach the claimant as he did not have his number. I find this to be absurd especially taking into account that the claimant had worked for the respondent for a cumulative of over 7 years. I do not think that the respondent made any effort to trace the claimant and although the respondent continued to remit the NSSF pay for the claimant, I do not believe that the claimant absconded duty but he was dismissed after he came back from his leave.

23. It is my finding that the respondent has not discharged his onus on a balance of probability of establishing that the claimant indeed absconded duty and that he took reasonable steps to contact the claimant. In any case, no warning letter or any documentation whatsoever has been tabled before court to demonstrate that this allegation is true. The court therefore finds and holds that the claimants termination was unfair within the meaning of section 45 of the *Employment Act*.

24. Having found that the claimant was unfairly dismissed from employment within the meaning of section 45 of the *Employment Act*. He is therefore entitled to the reliefs sought which I will now proceed to award as follows in favour of the claimant;

- i. One month's salary in lieu of notice
- ii. The claimant in his evidence stated that he was employed at a salary of Kshs 9,000. This was confirmed by the respondent. The claimant is therefore entitled to Kshs 9,000 under this head.
- iii. Compensation for unfair termination
- iv. Having established that the termination of the claimant was unfair and that the respondent never made endeavoured to accord the claimant any procedural fairness prior to terminating his service, the court deems an award of 10 months salary (Kshs 90,000/-) as reasonable compensation for unfair termination.

Underpayment

- v. Pursuant to Legal Notice No 117 of 2015, the claimant as a waiter was entitled to a salary of Kshs 10,496.90 under column 3. However, the evidence on record shows that he earned a constant salary of Kshs 9000 from the time he was employed until the time his employment was terminated.

From May 1, 2015 when the Legal Notice took effect to June 2017- 25 months

$2,623 \times 25 = \text{Kshs } 65,575$

Total amount payable to the claimant= Kshs 182,575



25. As regards the claim for leave dues, overtime and holiday, the same were not proved and as such I cannot make any awards under those heads.
26. In conclusion the court awards as follows:
- i. One month's salary in lieu of notice Kshs 9,000
 - ii. Compensation for unfair termination Kshs 90,000
 - iii. Underpayment. Kshs 182,575
281,575
27. I also award the claimant costs of the suit and interest at court rates from date of judgment till payment in full.
28. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

Abuodha Nelson Jorum

Judge ELRC

