



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Eldoret Express Company Limited (Cause 574 of 2017)
[2022] KEELRC 13210 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13210 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 574 OF 2017
MA ONYANGO, J
NOVEMBER 10, 2022**

BETWEEN

MICHAEL MBOGA NJOROGE CLAIMANT

AND

ELDOR ET EXPRESS COMPANY LIMITED RESPONDENT

JUDGMENT

1. Vide his Memorandum of claim dated and filed in Court on March 27, 2017, the claimant avers that his employment was wrongfully and unlawfully terminated by the Respondent, a limited liability company engaged in operation of public passenger transport.
2. It was his case is that he was employed by the Respondent on or about January 1996 in the capacity of a driver earning a monthly salary of Kshs 30,000/-.
3. The Claimant averred that he performed his duties diligently, with loyalty and to the Respondent's satisfaction until September 2015 when the Respondent unlawfully, unfairly and without just cause terminated his employment.
4. The Claimant seeks the following reliefs:
 - a. Kshs 484,400/- as itemized below:-
 - i. Salary *in lieu* of notice Kshs 30,000
 - ii. Salary arrears for August, September and October 2015 Kshs 90,000
 - iii. NSSF deductions for 11 months Kshs 4,400
 - iv. Compensation for unfair termination equivalent to 12 months' salary (30,000 x 12 months) Kshs 360,000



TOTAL Kshs 484,400

- b. Costs of this suit
 - c. Interest on (a) and (b) above
 - d. Certificate of Service
 - e. Any other relief as the Court may deem just.
5. In response to the claim, the Respondent on February 19, 2018 filed a Replying Memorandum dated February 16, 2018, in which it admits employing the Claimant from the year 1996 but insists he was earning a basic salary of Kshs 14,000/-.
 6. The Respondent avers that during the subsistence of his employment with the Respondent, the Claimant had a habit of absenting himself without leave. That he did not change this habit despite several warnings from the Respondent.
 7. It is further averred that the last time the Respondent heard from the Claimant, he had left the Country for greener pastures in Saudi Arabia where he had secured employment.
 8. The Respondent denied that it terminated the Claimant's employment, insisting that he was the author of his misfortunes by failing to adhere to professional work ethics despite being given a chance to do so.
 9. The Respondent maintains that the claim filed is without basis and urged this Court to dismiss it with costs to the Respondent.

Evidence

10. The suit was heard on February 7, 2022 with the Claimant testifying on his behalf and the Respondent calling one (1) witnesses, its Operations Manager to testify on its behalf.

Claimant's Case

11. In his testimony the Claimant stated that he was employed by the Respondent in the year 1996 as a temporary driver before he was engaged on a permanent basis in the year 2004.
12. He testified that he continued working for the Respondent until October 2014 when he fell sick and was given sick off. He reported to work after treatment and was told to report to Kitale. He stated that he was asked to report to the Respondent's director, one James Muigai Thungu, who was based in Kitale.
13. The Claimant could not recall the exact date when he went to Kitale. He testified that Mr. Thungu informed him that there was no money to pay him.
14. He testified that all his efforts to get his salary from Mr. Thungu proved futile. That it was at this point that he realized that his services had in fact been terminated by the respondent and therefore filed the instant suit seeking compensation as prayed.
15. On cross examination the Claimant reiterated that he was employed on permanent terms as from the year 2004 and worked continuously until September 2014 when he fell sick and was given sick off for two weeks by Mr Thungu.
16. He stated that he reported back to duty on either the 26th or October 28, 2014. He maintained that his salary for the months of August, September and October, 2014 was never paid to him despite his



demand. He clarified that he left the Respondent's employment in the year 2014 and not 2015 as indicated in his Memorandum of Claim, which he stated was an error.

17. The Claimant testified that the Respondent paid his NHIF but his salary remained unpaid. He testified that having worked for the Respondent for a long duration he knew that his services had been terminated based on Mr Thungu's reaction during their meeting.

Respondent's Case

18. The Respondent's witness (RW1), Joseph NGANGA THUNGU, the Respondent's operations manager adopted his witness statement dated October 1, 2021 as his evidence in chief. In his witness statement RW1 states that the Claimant was an employee of the Respondent from June 2004 to October 2014. That the Claimant was never dismissed from employment. That he was paid salary up to the last date of employment.
19. He testified that when the Claimant approached him for payment of his salary he approved the payment and the Claimant was paid in cash office.

Claimant's Submissions

20. It is submitted on behalf of the Claimant that the termination of his employment was wrongful, unfair and unlawful as he was neither informed of the reason for his termination nor given an opportunity to defend himself prior to the termination.
21. The Claimant maintains that having proved his case, he is entitled to the reliefs sought in his Memorandum of Claim. He relies on the provisions of section 41 of the *Employment Act*, 2007.
22. The Claimant prayed for award of maximum compensation for unfair termination in line with the provisions of Section 49 of the *Employment Act*, 2007 and as further fortified by the decisions in the cases of Paul *Wachira Ndonga v Keroche Breweries Limited* (2018) eKLR and *Ngurua Muita v Gyto Success Ltd* (2017) eKLR on compensation for unlawful and unfair termination
23. In conclusion, the Claimant urged this Court to be guided by the provisions of the law, the authorities relied upon and find merit in his claim and allow it as prayed.

Respondent's Submissions

24. The Respondent on the other hand submits that it did not terminate the Claimant's employment, rather that the Claimant absconded lawful duty and took up a role at Guardian Coach Limited as evidenced in the NHIF statement attached to the Claimant's bundle of documents.
25. The Respondent further submits that the Claimant has failed to prove his case of unlawful termination and therefore urged this Court to find the Claim devoid of merit. To fortify this argument the Respondent relied on the case of *Lucia Nduku Nzioka v Mt Laverna Girls Secondary school* (2019) eKLR where the Court held that where an employee is alleging unlawful termination the burden of proving the same lies with the employee in line with the provisions of Section 47 (5) of the *Employment Act*, 2007.

Analysis and Determination

26. Having considered the facts of this cause, evidence, submissions and authorities cited the parties hereto, the issues for determination are: -
 - a. Whether the Claimant was unlawfully terminated or she deserted duty;



- b. Whether the Claimant is entitled to the remedies sought.

Unfair Termination

27. Under Section 45(2) of the *Employment Act* termination of an employee's contract of service is unfair where the employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.
28. The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the *Employment Act*. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Reason for Termination

29. There is no letter of termination issued to the Claimant. He however insisted that his employment was unfairly terminated by the Respondent while he was away on sick off.
30. The Respondent on the other hand maintained that it did not terminate the Claimant's employment as alleged insisting that the Claimant absconded lawful duty.
31. This Court has on several occasions pronounced itself on the procedure an employer ought to apply where an employee is believed to have absconded lawful duty.
32. It is the duty of the Respondent to demonstrate to the Court the efforts made to contact the Claimant for purposes of enquiring his whereabouts. In the case of *Simon Mbithi Mbane v Inter Security Services Limited* (2018) eKLR the Court held that where there is an allegation of absconding duty, the employer must demonstrate the efforts made to contact such an employee.
33. No evidence was tabled by the Respondent to prove that it had tried to contact the Claimant during the period it claims that he had absconded duty. It is not even stated when the Claimant absconded duty. The evidence adduced by the Respondent does not respond to the Claimant's averments. No mention is made as to why the Claimant was not paid salary from August to October 2014.
34. From the evidence on record, I find that the Respondent has not rebutted the evidence adduced by the Claimant. I find the termination of the Claimant's employment unfair.

Whether the Claimant is entitled to the reliefs sought

41. The Claimant is entitled to the following:

i. Salary in lieu of notice

42. The Claimant is entitled to pay in lieu of notice by dint of the provisions of Section 36 of the *Employment Act*. He is awarded Kshs 30,000/-.

ii. Salary arrears for August, September and October, 2014..... Kshs 90,000

43. The Claimant maintained that he did not receive his salary for the months of August, September and October 2014 and when he made enquiries on the same he did not get a positive response from the



Respondent, with one of its directors, whom at the hearing the Claimant refers to as “mzee” totally ignoring him for three days.

43. The Respondent on the other hand, through RW1 maintained that the said salaries were paid as evidenced by the NHIF deductions made for the respective months. RW1 stated that payment was made in cash office.
44. No evidence of payment was adduced by the Respondent. Payment of NHIF or NSSF is no proof of payment of salary.
43. In absence of any proof of payment of the salary for the months of August, September and October, 2014, I find the claim with merit and allow it.

iii. NSSF deductions for 11 months...Kshs4,400/-

47. The records filed by the Claimant as well as his oral evidence on cross examination indicate that the Respondent remitted the Claimant’s NSSF deductions, a fact that was also confirmed by the Respondent’s witness. The Claimant is therefore not entitled to this prayer.

iv. Compensation for unfair termination

48. Having found that the termination of the Claimant’s employment was unfair, he is entitled to compensation by dint of Section 49 of the Employment Act, 2007. In view of the circumstances under which his employment was terminated and taking into account all other relevant factors such as the length of service and other factors enumerated under the provisions of Section 49(4) of the Employment Act, 2007, I award the Claimant Kshs 360,000/- being 12 months’ salary as compensation.

v. Certificate of Service

49. The Claimant is entitled to a Certificate of Service by dint of Section 51 of the Employment Act, 2007. The Respondent is thus directed to issue the Claimant with the certificate of service.

vi. Costs and interest

50. In view of the fact that the Claimant was unrepresented, I award him Kshs 30,000/- being reasonable expenses and disbursements, incurred in the prosecution of his case.

51. In conclusion, judgment is hereby entered in favour of the Claimant as against the Respondent in the following terms:-

- i. One month’s salary in lieu of notice Kshs 30,000
- ii. Salary arrears for August, September and October 2014 at Kshs 30,000 x 3 months Kshs 90,000
- iii. 12 months’ salary as compensation Kshs 360,000
- iv. Costs of the suit Kshs 30,000

Total Award Kshs 510,000

52. Interest shall accrue at court rates from the date of judgment until settlement in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO



JUDGE

