



**Kyalo v Central Farmers Garage Limited (Cause 1068 of 2016)  
[2022] KEELRC 13108 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13108 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1068 OF 2016  
JK GAKERI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**FREDRICK KYALO ..... CLAIMANT**

**AND**

**CENTRAL FARMERS GARAGE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant commenced this suit by a memorandum of claim filed on June 2, 2016 alleging unfair/unlawful termination of employment and non-payment of terminal dues and compensatory damages.
2. The claimant avers that he was employed by the respondent on April 1, 2015 in the body building departments at a monthly salary of Kshs 18,000/= and rendered services diligently.
3. The claimant further avers that on March 22, 2016 while at his place of work, was summoned by the manager who advised him that his services were no longer needed and was thus terminated from employment.
4. It is the claimant's case that his summary dismissal by the respondent was unlawful, unfair and inhumane in that a notice to show cause had not been issued, he was innocent and no hearing took place.
5. That the respondent refused to pay the claimant's terminal dues.
6. The claimant prays for;
  - a. A declaration that the respondent's terminal/dismissal of the claimant's employment was illegal, unfair and inhumane and the claimant is entitled to terminal benefits and damages.
  - b. An order for the respondent to pay the claimant his terminal dues and compensatory damages of Kshs 270,000 as follows;



- i. Untaken leave days for the year 2015 Kshs 18,000/=.
- ii. One month's salary *in lieu* of notice Kshs 18,000/=.
- iii. Salary for the month of March 2016 Kshs 18,000/=.
- iv. 12 months compensation Kshs 216,000/=
- c. Costs of this suit plus interest.

### **Respondent's Case**

7. The respondent filed a reply to the memorandum of claim on August 17, 2016 admitting that the claimant was its employee from April 1, 2015 under a written contract of even date but denies having breached the contract.
8. The respondent avers that on March 21, 2016, the claimant and 40 others came to the office complaining about late payments owing to a delay in having the cheque signed and had been sent to Kitale. That the manager Mr Mathew G. Mukhwana assured them that the money would be in their account by close of business on the same day and were asked to return to work but some of them downed their tools and walked out of the premises and the claimant was one of them and was dismissed for deserting the work place.
9. That the claimant was paid his monthly salary of Kshs 18,000/= and the only money owed is Kshs 9,450/=. A cheque in favour was drawn but he did not collect it.
10. It is the respondent's case that the claimant deserted the work place.
11. The respondent prays that the claimant's case be dismissed with costs.

### **Claimant's Evidence**

12. The claimant's written statement replicates the contents of the memorandum of claim.
13. In his oral evidence, the claimant testified that he was paid for leave although he could not remember the month in 2016.
14. He testified that they left the place of work as a group and had been promised a call. That he was invited to collect the cheque dated April 8, 2016 and was not given a termination notice.
15. On cross-examination, the claimant testified that he could not recall his last day at work. He insisted that at no time was he summoned by the manager as the written statement reads.
16. The claimant admitted that he had been suspended with others but had not disclosed it in the statement. The witness further admitted that his statement was not conclusive.
17. That his last day at work was March 22, 2017. He testified that he was not at work on March 21, 2017.
18. That nothing had happened before the suspension.
19. The claimant testified that for the days he worked, he was not paid for leave but had no evidence. That he was not aware of the cheque.
20. Prodded by the court, the claimant stated that it happened after the year had ended and his contract had already lapsed.



21. The respondent tendered no evidence as the witnesses it had hoped to rely on had since left its employment and it had no substitute.

### **Claimant's Submissions**

22. Submissions were due by June 9, 2022 but none of the parties had complied and the date was extended to 29<sup>th</sup> June on which date the respondent informed the court that it had filed and served the same morning.
23. A judgement date was given on July 27, 2022 by which time only the respondent had filed submissions.

### **Respondent's Submissions**

24. The respondent identifies two issues for determination namely; whether termination of the claimant's employment was unlawful or he deserted duty and entitlement to reliefs.
25. On termination of employment, the respondent relies on section 45 of the Employment Act, 2007 to urge that the claimant's employment was terminated because he deserted the workplace.
26. It is submitted that the claimant had left out crucial details in the statement such as the go slow by staff. It is urged that the claimant did not approach the court with clean hands and confirmed that he did not resume duty, which justified his termination by the respondent.
27. The decisions in Moses Gichuhi Gateru v Njuca Consolidated Co Ltd (2019) eKLR and Mwangi Odhiambo Dancun V Crest Security Services Ltd (2019) eKLR were relied upon to urge that desertion amounts to gross misconduct and rendered an employee liable for summary dismissal.
28. As to whether the claimant is entitled to the reliefs sought, the respondent urges that the claimant gave contradicting testimony on his last working day and did not resume duty and is not entitled to pay *in lieu* of notice.
29. That he did not apply for leave yet he was aware of the procedure.
30. It is further submitted that even after the claimant deserted the work place, the respondent computed his dues and drew a cheque which the claimant declined to collect.
31. It is urged that the respondent's willingness to meet its obligations to the claimant should invalidate the claimant's claim for compensation.

### **Analysis And Determination**

32. The issues for determination are;
- i. Whether the claimant's employment was terminated or he deserted duty.
  - ii. Whether the claimant is entitled to the reliefs sought.
33. As to whether the claimant deserted his duties or his employment was unfairly terminated by the respondent, the starting point is the jurisprudence on desertion or absconding of duty.
34. According to *Black's Law Dictionary* 10 Edition, desertion means

“The wilful and unjustified abandonment of a person's duties or obligations”



35. In the often cited South Africa decision in *Seabolo v Belgravia Hotel* (1997) 6 BLLR 829 (CCMA), the court sought to distinguish desertion from unauthorised absence from duty as follows;

“... desertion is distinguishable from absence without leave, in that, the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return.”

36. In this case, the claimant’s evidence was inconsistent on how his employment was terminated but the respondent maintained that the claimant deserted duty with other colleagues and he refused to collect his cheque.

37. Instructively, the respondent avered and submitted that the claimant deserted the workplace and thus terminated his employment. It is urged that desertion is a form of gross misconduct that warrants summary dismissal.

38. Notably, the respondent adduced no evidence of when and how the claimant absconded duty and what it did as a consequence.

39. It is well settled law that when an employer alleges that an employee deserted or absconded duty, the employer must demonstrate the reasonable steps it took to ascertain why the employee is not reporting to work. It was so held in *Felistas Acheba Ikatwa v Charles Peter Otieno* (2018) eKLR.

40. Similar sentiments were expressed in *Simon Mbiti Mbane v Inter Security Services Ltd* (2018) eKLR and *Joseph Nzioka v Smart Coatings Ltd* (2017) eKLR.

41. Relatedly, where an employee deserts the workplace, the respondent is required to at the very least issue a notice to show cause to put the employee on notice that termination of employment was being considered on account of his absence and in the event of no response or unsatisfactory response, terminate the employees contract of service.

42. The respondent adduced no scintilla of evidence that it took any of these steps.

43. The court is further guided by the sentiments of Onyango J. in *Judith Atieno Owour v Sameer Agriculture and Livestock Ltd* (2020) eKLR as follows:

“Further, even if she had absconded, she is by law entitled to a fair disciplinary process as set out in section 41 of the *Employment Act*, 2007. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to the termination. It is the duty of the respondent to show this court it did accord the claimant a fair hearing prior to her termination”

44. These sentiments apply to the facts of this case on all fours.

45. Both the provisions of the *Employment Act*, 2007 and in particular sections 41, 43, 44, 45 and 47(5) and case law are consistent that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair as elaborated by the Court of Appeal in *Naima Khamis v Oxford University Press EA Ltd* (2017) eKLR.

46. The sentiments of Ndolo J. in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR as also instructive. The judge stated as follows;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.



Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

47. In this case, the respondent led no evidence to demonstrate that the claimant absconded duty or deserted the place of work to controvert the claimant’s claim that his employment was determined by the respondent.
48. This position finds support in *Mwangi Odhiambo Duncan v Crest Security Services Ltd* (supra) where Ndolo J. stated as follows;
- “What is clear is that the respondent has failed to establish a case of desertion against the claimant. In the converse, the claimant’s claim that his dismissal was wrongful has not been dislodged.”
49. From the evidence on record, it is clear that the respondent did not take the claimant through any disciplinary process as by law required.
50. For the foregoing reasons, it is the finding of the court that termination of the claimant’s employment by the respondent was unfair.

#### **Reliefs**

51. Having found that termination of the claimant’s employment by the respondent was unfair, the court proceeds as follows;
- i. Having found that termination of the claimant’s employment by the respondent was unfair, a declaration to that effect is hereby issued.
  - ii. One month’s salary *in lieu* of notice
52. Having found that the respondent failed to establish that the claimant absconded duty, he is awarded Kshs 18,000/= as pay *in lieu* of notice.
- iii. Untaken leave for the year 2015
53. The claimant led no evidence to establish the alleged outstanding leave days. It is unclear how many they are. The written statement makes no reference to pending leave days.
- The prayer is declined.
- iv. Salary for March 2016
54. On cross-examination, the claimant could not remember the last day at the work place. The only thing he could recall was that it was 2016. A few seconds later, he testified that he reported on March 22, 2016. He provided no evidence that he discharged his duties as required. The claimant’s inconsistency on dates renders his evidence unreliable.
55. More significantly, documents on record show that the respondent is still holding the claimant’s Kshs 9,450/= which he declined to collect.
- The prayer for salary for March 2016 is declined.
- v. Compensation



56. Having found that the claimant's employment was unfairly terminated, the claimant is entitled to compensation in accordance with the provisions of section 49(1) (c) of the Employment Act, 2007.
57. Taking into account the fact that the claimant was an employee of the respondent for less than one (1) year, contributed substantially to the termination, did not demonstrate any wish to continue serving coupled with the respondent's demonstrable willingness to honour its obligations, the court is satisfied that the equivalent of one (1) month's salary is fair, Kshs 18,000/=
58. In the upshot, judgement is entered for the claimant against the respondent as follows;
- a. One month's salary *in lieu* of notice Kshs 18,000/=
  - b. Equivalent of one month's salary Kshs 18,000/=
- Total Kshs 36,000/=
- c. Costs of this suit.
  - d. Interest at court rates from date of judgment till payment in full.
59. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

