



**Matano v City Bookshop Limited (Cause 166 of 2018)
[2022] KEELRC 13471 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13471 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 166 OF 2018
AK NZEI, J
DECEMBER 8, 2022**

BETWEEN

SIMON MACHEMBO MATANO CLAIMANT

AND

CITY BOOKSHOP LIMITED RESPONDENT

JUDGMENT

1. The claimant herein sued the respondent *vide* a memorandum of claim dated March 23, 2018 and pleaded:-
 - a. that the claimant was employed by the respondent as a shop attendant on July 15, 2008, earning a salary of ksh 10,000, and was terminated from employment on July 2016.
 - b. that on reporting to work in July 2016, the claimant was told by the respondent's manager, one Mr Dungarwalla, to go back home as there was no work, and that no reasons were given for the verbal termination.
 - c. that from the year 2010 to 2016, the respondent did not remit the claimant's NSSF statutory deductions, contrary to section 21 of the *Employment Act*, and that the claimant did not proceed on leave during the period of employment.
 - d. that the claimant was working during public holidays at no extra pay, and was not issued with a certificate of service upon termination.
 - e. that termination of the claimant's employment was unfair, unprocedural, and unlawful as there was no compliance with sections 41, 43 and 44 of the *Employment Act*, and that the claimant was not notified of the impending termination or paid in lieu of notice.
2. The claimant set out the following claim against the respondent:-



- a. One month salary *in lieu* of notice.....ksh 10,000.
 - b. Leave allowance for the period between July 15, 2008 to July 15, 2026 (ksh 10,000X8 years)ksh 80,000
 - c. House allowance for the period between July 15, 2008 to July 15, 2016 (96 months-ksh 10,000x15% (ksh 1,500)X96 monthsksh 144,000
 - d. Public holidays for the period July 15, 2008 to July 15, 2016 (80 holidays) (ksh 10,000/26 = 384.62 X 80).....ksh 61,539.20
 - e. Unremitted NSSF deductions for the period of January 2012 to July 2016 (55 months) (ksh 400x55 months)..ksh 22,000
 - f. Compensation for unfair termination (ksh 10,000x12 months)ksh 120,000
 - g. Certificate of service.
 - h. Costs of the suit and interest at court rates.
3. The claimant also filed his written witness statement and a list of documents dated February 9, 2018, both of which accompanied the memorandum of claim. Document listed on the said list of documents included the claimant's NSSF statement and a demand letter dated January 18, 2018.
 4. The respondent entered appearance on March 27, 2018 and filed response to the claim on May 17, 2018. The respondent denied the claimant's claim and pleaded:-
 - a. that the claimant was initially employed as a printer operator with city commercial printers between 2008 and 2013.
 - b. that on January 1, 2013, the claimant was employed by the respondent as a shop attendant, earning a monthly salary of ksh 10,000, inclusive of house allowance.
 - c. that the claimant worked for the respondent until September 15, 2015 when he collected a salary advance of ksh 5,000 and never returned back to work until the respondent was served with summons in the suit herein.
 - d. that the claimant willingly resigned from his work, and without notice to the respondent.
 - e. that the respondent dutifully paid the claimant's statutory deductions.
 - f. that the respondent did not terminate the claimant's employment and did not, therefore, breach the law.
 5. The respondent further filed a list of documents dated May 17, 2018, listing salary vouchers for the period 2013 to 2015, and a witness statement of one Hafeezali Dungarwalla dated May 13, 2022.
 6. Trial opened on November 11, 2019 when the claimant testified before Rika, J. The claimant adopted his filed witness statement and testified that he was employed by the respondent in July 2008 and left in July 2016; earning a monthly salary of ksh 10,000. The claimant testified that he was told by word of mouth that there was no work, and that no reasons were given. That the termination was unfair.
 7. It was the claimant's further testimony that he worked from Monday to Saturday and on public holidays; and never took leave except in 2014 when he took seven days. The claimant denied disappearing after taking a salary advance, and denied having signed for a salary advance as alleged by



- the respondent. The claimant produced in evidence the documents referred to in paragraph 3 of this judgment.
8. Cross-examined, the claimant admitted having taken leave in 2013, and 2014, and stated that the respondent did not remit the claimant's NSSF contributions after the year 2011. The claimant further testified that he would acknowledge by hand (on payment vouchers) what was paid to him, and denied ever receiving house allowance.
 9. The respondent's witness, Zoeb Hafeezali Dungarwalla (RW-1) testified before me on June 29, 2022. He told the court that he was the respondent's general manager, and adopted his witness statement dated May 13, 2022 as his testimony and produced in evidence the documents listed on the respondent's list of documents dated May 17, 2018. The witness further testified:-
 - a. that the claimant was not terminated, but left employment on his own will.
 - b. that the claimant used to take leave and that the salary vouchers the witness (RW1) produced showed the number of local leave days that the claimant used to take on particular months.
 - c. that the salary paid to the claimant was inclusive of house allowance, and that the salary vouchers showed as much.
 - d. that the claimant had not particularized on which public holidays he worked, and that as a bookshop, the respondent did not open on Sundays and public holidays.
 - e. that NSSF remittances were made.
 10. Cross-examined, RW-1 testified that the claimant absconded duty, and that he (RW-1) did not have any letter, either to the claimant or to the labour office, in that regard. On the issue of leave, the respondent testified that according to the records held by the respondent, the claimant took seventeen days leave in 2013, 12 days in 2014 and 9 days in 2015.
 11. On house allowance, the respondent's witness (RW-1) testified that the salary vouchers signed by the claimant had no indication of payment of house allowance to the claimant, and that the part for "house allowance" on the salary vouchers was left blank. The witness (RW-1) admitted that the minimum salary for a shop attendant in 2013 to 2016 was Ksh 13,201.55, exclusive of house allowance. The witness further stated that he was aware of the minimum wage payable, but the claimant agreed to work for less, ksh 10,000 per month.
 12. Upon considering the pleadings filed and evidence adduced by both parties, issues that emerge for determination are:-
 - a. Whether the claimant was employed by the respondent in 2008 as pleaded by the claimant.
 - b. Whether the claimant's employment was terminated by the respondent, and if so, whether the termination was unfair.
 - c. Whether the claimant is entitled to the reliefs sought.
 13. On the first issue, the respondent did not deny having employed the claimant. All it denied was the date of such employment. Whereas the claimant pleaded and testified that he was employed by the respondent in July 2008, the respondent pleaded and testified that it employed the claimant in 2013. The claimant produced in evidence an NSSF statement indicating that the claimant was an employee of the respondent as at the year 2008, and even before that date. The NSSF statement further indicated that remittances on the claimant were made by the respondent upto the year 2011.



14. Under section 10(2) of the *Employment Act*, the date of commencement of an employee's employment is one of the terms that must be included in an employment contract. Section 10(7) of the Act provides as follows:-

“(7) if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

15. In the present case, the respondent did not disprove the evidence adduced by the claimant that he was employed by the respondent in the year 2008. Further, the respondent did not prove its allegation that it employed the claimant in 2013. I make a finding that the claimant was employed by the respondent before the year 2008, but because parties are bound by their pleadings, the year 2008 will be treated as the year of the claimant's employment for purposes of the claim herein.

16. On the second issue, the claimant pleaded and testified that his employment was verbally terminated by the respondent in July 2016, but the respondent pleaded and testified that the claimant left employment/absconded duty in 2015 on his own will. The respondent did not, however, tell the Court what action it took after the claimant allegedly absconded duty. Absconding duty is itself a gross misconduct. Under section 44(4) of the *Employment Act*, an employer whose employee absconds duty and/or absents himself from the place appointed for performance of his work is expected to commence disciplinary proceedings against such employee under section 41 of the Act. The respondent did not adduce any evidence to back up the absconding allegation. Further, the respondent, being the employer, did not adduce any form of evidence to show that the claimant left employment in 2015 and not July 2016 as pleaded and testified by the claimant. The respondent appears to have taken a very slippery path regarding his employment relationship with the claimant by failing to keep records in respect thereof, save for some printed/standard payment vouchers which the claimant was said to have been signing on receipt of his salary. I make a finding that the claimant's employment was terminated by the respondent.

17. On whether termination of the claimant's employment was unfair, section 41 of the *Employment Act* sets out mandatory procedural requirements that every employer intending to terminate an employee's employment, for whatever reason, must adhere to. section 41 of the *Employment Act* provides as follows:-

“(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”



18. The respondent was not shown to have in any way complied with the foregoing provisions of the statute. The Court of Appeal held as follows in the case of CMC Aviation Limited v Mohammed Noor [2015] eKLR:-

“In view of the foregoing, we find that the appellant’s act of summarily dismissing the respondent without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In Kenya Union of Commercial Food And Allied Workers v Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR”

19. It is my finding that termination of the claimant’s employment was unfair.
20. On the third issue, and having found that termination of the claimant’s employment was unfair, I award the claimant the equivalent of seven months’ salary being compensation for unfair termination of employment. That is ksh 10,000 X7 = ksh 70,000. I have taken into account the circumstances in which the claimant’s employment was terminated.
21. On the claim for house allowance, the respondent did not demonstrate that the ksh 10,000 monthly salary paid to the claimant from July 2008 to July 2016 was either consolidated or that it was inclusive of house allowance. The respondent (RW-1) even admitted in his testimony in court that the ksh 10,000 salary paid to the claimant was far below the minimum wage for the category of workers to which the claimant belonged (shop assistant). I allow the claim for unpaid house allowance at ksh 144,000 as prayed.
22. I also allow the claim for one month salary in *lieu* of notice as prayed by the claimant, that is Ksh 10,000.
23. The claim for payment for public holidays worked was not particularized in the claimant’s pleadings, and was not proved on a balance of probability. The same is declined.
24. The claim for NSSF deductions is declined. Once deducted from an employee’s salary by the employer, the deductions stop being the employee’s entitlement. As I have held previously, such deductions become the entitlement of the statutory body for which the deductions were made. Such statutory bodies, including NSSF, are empowered by the law to compel remittance by employers of deductions made regarding them. The statutory bodies are even given prosecutorial powers by their respective parent statutes to compel remittance of deductions.
25. The claim for issuance of a certificate of service is allowed.
26. Ultimately, and having considered submissions filed by both parties, judgment is hereby entered for the claimant against the respondent for:-
- a. The equivalent of seven months’ salary being compensation for unfair terminationksh 70,000
 - b. Unpaid house allowanceksh 144,000
 - c. One month salary in lieu of noticeksh 10,000
- Total ksh 224,000



27. The awarded sum is subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
28. The respondent shall issue the claimant with a certificate of service within 30 days of this judgment.
29. The claimant is awarded costs of the suit and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER, 2022.

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Ms Tinga Claimant

Ms. Mainga Respondent

