



**Wekesa & another v Gyto Security Limited (Cause 786 of 2017)
[2022] KEELRC 13438 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 786 OF 2017
JK GAKERI, J
DECEMBER 7, 2022**

BETWEEN

EVANS MAKOKHA WEKESA 1ST CLAIMANT

WILSON KIPKOECH NGEYWO 2ND CLAIMANT

AND

GYTO SECURITY LIMITED RESPONDENT

JUDGMENT

1. The Claimants initiated this claim by a Memorandum of Claim filed on April 27, 2017 alleging unlawful, wrongful and unfair termination of employment.

The Claimants Case is Pleaded as Follows;

2. The 1st Claimant avers that he was employed by the Respondent on November 29, 2014 as a security guard at Kshs 8,000/= per month but was not issued with a written contract of employment.
3. That his duty station was Everest Park Estate, Athi River and from March 9, 2016 at LK Company and had a clean record.
4. The 1st Claimant avers that on March 15, 2016 at the workplace at 10 p.m while on patrol, he was accosted by thugs who frisked, robbed and assaulted him and carried him to a store where he was guarded by one of the thugs while the others ransacked the premises, but his cell phone was not taken away.
5. That when the thug guarding him joined the rest, he freed himself and escaped and called the supervisor, Mr Kilonzo to report the incident.
6. That by the time Mr Kilonzo and the police arrived, the thugs had left.



7. That the police advised that they record a statement the following morning.
8. That Mr Kilonzo and the response team embarked on a search of the other guard who they found at 5.00 am restrained in a store.
9. The Claimant further avers that on March 16, 2016, he and his colleague in the company of the Supervisor, Manager and Parade Commander visited the police station but they were advised to seek medical attention first.
10. That the Respondents abandoned them at the Athi River Health Centre where they were not treated because they had been robbed of their possessions but the Respondent allowed them to proceed on sick off for one week.
11. It is the Claimant's case that when he reported to work on March 24, 2016, he was informed that LK Company had terminated the contract with the Respondent and was directed to report to Everest Park Estate in Mid-April and when he did he was not allowed to work and was to check in May and when he did on May 1, 2016, he was informed there was no work.
12. That termination of his employment was unfair.
13. That he was not paid a house allowance and had no rest day and worked during public holidays and his NSSF contributions were not being remitted.
14. The second Claimant avers that he was employed by the Respondent on May 3, 2015 as a security guard at Kshs 8,000/= per month and no written contract was provided.
15. The 2nd Claimant's averments on the incident rehashes those of the 1st Claimant save that he was manning the main gate and left at one of the stores with one of the thugs as a guard until 1 p.m when part of the gang came to the store to report that the 1st Claimant had escaped and the gang left leaving him restrained until 5 a.m when he was freed by the 1st Claimant, supervisor and other guards.
16. That they reported to the police station at 8.00 a.m and were advised to seek medical attention first.
17. The Claimant prays for;
 1. A declaration that termination of the Claimants employment was unlawful, wrongful and unfair.
 2. An order directing the Respondent to pay the Claimants as follows;
 - 1st Claimant
 - (i) Days worked Kshs 7,050.00
 - (ii) In lieu of termination notice Kshs 11,330.10
 - (iii) In lieu of leave Kshs 14,805.00
 - (iv) In lieu of public holidays Kshs 7,990.00
 - (v) In lieu of rest days Kshs 36,660.00
 - (vi) House allowance Kshs 32,996.97
 - (vii) Severance pay Kshs 10,458.48
 - (viii) Service pay Kshs 10,458.48



- (ix) Twelve months compensation Kshs 135,961.20
- 2nd Claimant
- (i) Days worked Kshs 7,050.00
 - (ii) In lieu of termination notice Kshs 11,330.10
 - (iii) In lieu of leave Kshs 9,151.15
 - (iv) In lieu of public holidays Kshs 4,357.70
 - (v) In lieu of rest days Kshs 22,660.04
 - (vi) Housing allowance Kshs 20,394.00
 - (vii) Severance pay Kshs 6,536.00
 - (viii) Service pay Kshs 6,536.00
 - (ix) Twelve months compensation Kshs 135,961.20
- 3. Certificate of service
 - 4. Costs of this cause
 - 5. Interest on the sum awarded.

Respondent's Case

- 18. The Respondent filed its Memorandum of Reply on August 13, 2019.
- 19. The Respondent denies its description by the Claimants and avered that the pleadings as drawn were defective and incompetent and would seek their striking out.
- 20. The Respondent denies the alleged attack of the Claimants by thugs or having abandoned them at the Athi River Health Centre.
- 21. It is the Respondent's Case that it requested the Claimants to move to a different location but they declined and did not report to work after treatment and sick off. That they refused to resume duty.
- 22. That the Claimants claimed and were compensated for the injuries sustained.
- 23. The Respondent further denies having terminated the Claimants employment unfairly or unlawfully.
- 24. That the Claimants deserted duty without notice.
- 25. That the Claimants took all their leave days and are thus not entitled to leave or pay in lieu of leave.
- 26. That the Claimants were members of the NSSF and all deductions were remitted.
- 27. It is the Respondent's case that it had initiated disciplinary proceedings but the process was thwarted by the current suit.
- 28. The Respondent prays for dismissal of the Claimants suit with costs.

Counter-claim

- 29. The Respondent's counter-claim is based on the allegation that the Claimants deserted duty after having failed to take up a new assignment.



30. The Respondent prays for;
- (i) Reimbursement of Kshs 16,000/= as one month's salary in lieu of notice.
 - (ii) Order directing the Claimants to return their uniforms or Kshs 8,000/= in the alternative.
 - (iii) Costs of the counter-Claim.
 - (iv) Interest on the above sums.
31. The Claimants filed a Response to the Memorandum of Reply dated May 19, 2022, long after pleadings had closed, but with leave of the court.

Claimants' Evidence

32. On cross-examination, the 1st Claimant testified that he and the 2nd Claimant were given 7 days off.
33. That he returned the uniform to Mr Kennedy Kilonzo, the supervisor and signed for it.
34. The witness confirmed that after the attack, they had no money and were not treated.
35. The 2nd Claimant contradicted himself on the claim for compensation for injuries but confirmed that he returned the uniform on May 1, 2016, to Mr Kilonzo and his last salary was paid on March 4, 2016. He denied having absconded duty.

Respondent's Evidence

36. RWI, Mr Ayub Sitati, on cross-examination confirmed that the Claimants were at the workplace on March 15, 2016 and were given one (1) day off after the incident but did not report to work after they were assigned a new duty station.
37. The witness confirmed that he did not issue a notice to show cause to the Claimants for desertion.
38. It was his testimony that the Claimants had been invited for a disciplinary hearing by the time the suit herein was filed and they did not attend the hearing. The witness, however, admitted that he had neither evidence of the invitation nor non-attendance.
39. The witness sought the return of the uniforms held by the Claimants but had no evidence to show that the uniforms were not returned.
40. Finally, the witness testified that on May 1, 2016, the Claimants met Mr Kilonzo.

Claimants' Submissions

41. The Claimant isolated four issues for determination, namely whether the Claimants were employees of the Respondent, termination, entitlement to reliefs and whether the counter-claim is merited.
42. The 1st issue was uncontested by the Respondent and nothing turns on it.
43. As to whether termination of employment was fair and unlawful, it was submitted that the Respondent did not demonstrate desertion by the Claimants or attempts to reach out to them to resume duty.
44. Reliance was made on the decisions in *Joseph Ouko Lwambe v Royal Garment EPZ Industries Ltd* [2018] eKLR, *Richard Maingi v Wells Fargo Ltd* [2017] eKLR, *Simon Mbithi Mbane v Inter-security Services Ltd* [2018] eKLR and *Joseph Nzioka v Smart Coating Ltd* [2017] eKLR to buttress the submission.



45. The court was urged to find that the Claimants employment was terminated due to reduced workload.
46. Reliance was made on the provisions of section 43 (1) and 45 of the [Employment Act, 2007](#) to urge that the termination of employment was unfair.
47. The provisions of section 2 and 40 of the [Employment Act](#) and several decisions on redundancy such as [Kenya Airways Ltd v Aviation & Allied Workers Union Kenya and 3 others](#) [2014] eKLR were relied upon to urge the court that the purported redundancy did not pass muster and was thus an unfair termination of employment.
48. Finally, the provisions of section 41 of the [Employment Act](#) and decisions such as [Samuel Muchiri Gikeno V Henkel Chemicals \(EA\) Ltd](#) (2014) eKLR and [Peter Apolo Ochieng v Amedo Centre Kenya Ltd](#) [2016] eKLR among others were cited to reinforce the Submission that termination of the Claimants employment was procedurally unfair.
49. As regards the reliefs sought, it was entitled that the Claimants are entitled to pay for the days worked in March 2016, a sum of Kshs 7,050/= as well as notice pay as no notice of termination was given.
50. Leave pay, it was submitted was justified on the provisions of sections 28 and 74 of the [Employment Act](#) as well as the decision in [Lawi Wekesa Wasike v Mattan Contractors Ltd](#) [2016] eKLR on the obligation of the employer to keep records.
51. A similar Submission was made in relation to public holidays and rest days.
52. On housing allowance, it was urged that the Respondent neither housed the Claimants nor paid them a housing allowance as ordained by section 31 of the [Employment Act](#) and their salary was not consolidated.
53. The claim for severance pay was grounded on section 40(1) (g) of the [Employment Act](#) and premised on the submission that the Claimants were declared redundant.
54. The Claimants urged that the court should award service pay since the Respondent did not avail evidence of remitting NSSF contributions.
55. Finally, the Claimants submitted that since their employment was terminated unfairly, they were entitled to compensation as provided by section 49(1) (c) of the [Employment Act](#).
56. As regards the counter-claim, it was urged that as the Respondent failed to establish desertion, the claim for pay in lieu of notice was baseless. On uniforms, it was submitted that the Claimants returned the uniforms on May 1, 2016 and the Respondent had the register.
57. The court was urged to find that the Claimants have proved their case on a balance of probability.

Respondent's Submissions

58. The Respondent's Submissions addressed issues of evidence, unlawful termination of employment and the reliefs sought.
59. As regards the evidence on record, it was submitted that the summary dismissal of the Claimants by the Respondent was conducted in accordance with the law. That the provisions of sections 41, 44 and 45 of the [Employment Act](#) were complied with.
60. It was submitted that the Respondent had sufficient or reasonable grounds to terminate the Claimants employment and they were afforded an opportunity to explain themselves but chose not to do so.



61. As regards the reliefs sought, the Respondent submitted as follows:
- (i) The salary for March 2016 was paid in full although the Claimants did not work for the entire month.
 - (ii) The Claimants had taken all leave days.
 - (iii) The Claimants did not work on public holidays and if they did, they were paid.
 - (iv) The Claimants had one rest day every week.
 - (v) The Respondent paid the Claimants a gross salary inclusive of house allowance.
 - (vi) The Claimants were not declared redundant for a claim for severance to arise.
 - (vii) The Claimants were members of the NSSF and their contributions were remitted to the NSSF.
 - (viii) The Claimants deserted duty and were lawfully terminated and are not entitled to compensation.
62. Finally, the Respondent submitted that should the court find that termination of the Claimants employment was unfair, they should be awarded a minimal sum of one month's gross salary.
63. The decisions in *Samuel Kalomit Murkomen v Telkom Kenya Ltd* [2017] eKLR and *Kenya Commercial Bank Ltd v Thomas Nyangi Mwita* [2019] eKLR among others were relied upon to reinforce the submission.

Determination

64. The issues for determination are:
- i. Whether the Claimants employment contract was unlawfully terminated or they absconded duty.
 - ii. Whether the Claimants are entitled to the remedies sought.
65. As to whether the Claimants deserted the work place or their employment was unfairly terminated by the Respondent, the starting point is the evidence on record.
66. While the Claimants allege that their employment was unlawfully terminated when the Respondent informed them that there was no work for them on March 24, 2016, the Respondent's case is that the Claimants did not report to work after they were granted one (1) day off duty following the incident on the night of March 15, 2016. That they deserted the workplace.
67. According to *Black's Law Dictionary* 9th Edition, desertion means;
- “The wilful and unjustified abandonment of a person's duties or obligations.”



68. In *Seabolo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA), a South African Court explained desertion 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.”

69. Although the Respondent maintains that the Claimants deserted their place of work and was open to receive them, it tendered no evidence of the action it took to contact them to ascertain why they were not resuming duty or issue a notice to show cause.

70. RWI confirmed on cross-examination that he did not issue a notice to show cause after the Claimants did not return to their duty station after treatment.

71. In addressing this issue, the court is guided by the sentiments of the court in *Felistas Acheba Ikatwa v Charles Peter Otieno* [2018] eKLR as follows;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

72. Similar sentiments were expressed in *Christpine Onguso Okinyi v Devki Steel Mills Ltd* [2018] eKLR, *Simon Mbithi Mbane v Inter Security Services (Supra)* and *Joseph Nzioka V Smart Coating Ltd (Supra)*.

73. In the instant case, the Respondent led no evidence of the desertion or how it dealt with the alleged desertion.

74. 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 fair hearing prior to her termination.”

75. This holding applies to the facts of the instant case on all fours.

76. Although the Respondent alleged that it had intended to conduct disciplinary proceedings against the Claimants, but for the suit herein, it led no evidence on the steps it had taken to actualize the process.

77. But more significantly, while the alleged desertion took place in March, 2016, this suit was filed on April 27, 2017 slightly more than one (1) year thereafter. The Respondent’s attempt to connect the two overstretches imagination and is not plausible.

78. Relatedly, RWI confirmed on cross-examination that the Claimants did not attend the disciplinary hearing and that he had no evidence to establish their non- attendance.

79. Contrary to the Respondent’s submissions that the Claimants were afforded an opportunity to explain themselves but ignored it, the Respondent rendered no evidence of the invitation to the hearing, or when the hearing was scheduled to take place, who the members of the panel were and what they resolved when the Claimants failed to attend the hearing.



80. In a nutshell, the Respondent led no evidence to demonstrate that the Claimants absconded or were taken through a disciplinary process as provided by the provisions of the *Employment Act*.
81. This position finds support in the often cited decision of Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR where the learned Judge held 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 the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
82. The court is guided by these sentiments.
83. For the above mentioned reasons, it is the finding of the court that the Respondent has failed to establish on a balance of probabilities that it had a substantive justification to terminate the Claimants employment or did so in accordance with a fair procedure.
84. It is the further finding of the court that termination of the Claimants employment was neither substantively nor procedurally fair.
85. Having so found, I will now examine the reliefs available to the Claimants.

(i) Days worked in March 2016

86. It is not in dispute that the Claimants were at their duty station on March 15, 2016 and the Respondent’s witness confirmed as much and there is no evidence on record that they rendered any service to the Respondents thereafter.
87. Strangely, the Respondent led no evidence of the Claimants salary nor payment of the last salary.
88. Although the Claimants did not state the number of days worked in March for the Respondent’s response, the first 15 days of month are agreed upon and are accordingly awarded.

(ii) Notice pay

89. In its submissions, the Respondent submitted that it had a valid reason to summarily dismiss the Claimants from employment as they disobeyed a lawful order. Having found that the Respondent failed to establish desertion by the Claimants or fair termination of employment, it follows that the Claimants were entitled to notice pay and since it was not given by the Respondent, it is awarded.

(iii) Leave days

90. Neither the written statements of the Claimants nor the oral testimony makes reference to the number of days claimed and when they accrued. Similarly, the Respondent testified that the Claimants had no pending leave days. Guided by the mantra that he who alleges must prove, the prayer is unproven and is disallowed.

(iv) Public Holidays and rest days

91. Neither of the Claimants articulated the particulars of this prayer. Neither the written statements nor the oral testimony made reference to the number of days claimed or the public holidays in question. The prayer is unproven and is disallowed.



(v) House allowance

92. As submitted by the Claimants, housing allowance is a statutory right provided by section 31 of the *Employment Act*. It is not in dispute that Respondent did not provide accommodation to the Claimants nor pay a housing allowance or consolidated salary.
93. The Respondent's submission that the salary paid was inclusive of house allowance is patently untenable as it was not supported by any evidence. The Respondent availed no evidence of the salary it was paying the Claimants not even a payslip was provided to substantiate the claim.
94. An employer is legally bound to provide a statement of the Claimants salary and deductions made.
95. The Respondent led no evidence of compliance with the provisions of section 31 of the *Employment Act, 2007*.
96. The Claimants are awarded a housing allowance of 15% of the basic salary for the duration they were in employment.

(vi) Severance pay

97. Contrary to the Claimants submission that their employment was terminated by the Respondent on account of redundancy, they led no evidence to that effect.
98. Further, even if they were declared redundant, the Respondent did not comply with the provisions of section 40 of the *Employment Act* and the process undoubtedly transitioned to an unfair termination of employment. Severance pay is only payable under section 40 (1) (g) of the *Employment Act* where redundancy is conducted strictly in accordance with the Act. It is not awarded by the court unless omitted in the benefits paid to an employee declared redundant.

The prayer is declined.

(vii) Service pay

99. While the Claimants allege that NSSF deductions made by the Respondent were not remitted to the National Social Security Fund, the Respondent availed no evidence that it deducted and remitted the contributions.
100. The 1st Claimant's NSSF statement dated April 13, 2017 show that no contributions were submitted to the NSSF before April 2016.
101. NSSF contributions were mandatory at the time and the Respondent was obligated to deduct and remit the same to the NSSF on a monthly basis which it does not appear to have been doing.
102. The foregoing notwithstanding, the courts is aware that remission of NSSF contributions is governed by the NSSF Act which is enforced by the NSSF board. However, in this case since the deductions were made but not remitted, the same are recoverable from the employer at Kshs 200/= per month for the duration served. The employer's contribution is not awarded. The employer's contribution is not awarded.

(viii) Twelve (12) months compensation

103. Having found that termination of the Claimants employment was unfair for want of substantive justification and fair procedure, the Claimants are entitled to the relief provided by section 49 (1) (c) of the *Employment Act, 2007* subject to the provisions of section 49 (4) of the Act.



104. In determining the appropriate level of compensation, the court has considered the following;

- i. The Claimants had no warning letters or related disciplinary matters.
- ii. The Claimants wished to continue in the Respondents employment.
- iii. While the 1st Claimant was an employee of the Respondent for a duration of about 1 year 3 months and 14 days, the 2nd Claimant served for 10 months and 12 days which is fairly short time.
- iv. Neither of the Claimants appealed the Respondent's decision.

105. In light of the foregoing, the court is satisfied that the equivalent of 3 months salary for the 1st Claimant and 2 months salary for the 2nd Claimant is fair.

Counter-claim

106. The Respondent adduced no evidence to establish the counter-claim. It is unproven and is disallowed with no orders as to costs.

107. In conclusion, judgement is entered for the Claimants against the Respondent in the following terms:

- (a) A declaration that termination of the claimants employment was unfair.
- (b) 15 days worked in March 2016.
- (c) Pay in lieu of notice.
- (d) Housing Allowance at the rate of 15% of the basic salary.
- (e) Unremitted NSSF deductions at the rate of Kshs 200/= per month for the duration of employment.
- (f) Equivalent of 3 month's salary for the 1st claimant and 2 month's salary for the 2nd claimant.
- (g) Costs of this suit
- (h) Interest at court rates from date of judgement till payment in full.

108. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 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 15th March 2020 and subsequent directions of 21st 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

