



**Kenya Wine Agencies Ltd v Murungu (Appeal E 016 & E 019 of 2021
(Consolidated)) [2022] KEELRC 13413 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13413 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E 016 & E 019 OF 2021 (CONSOLIDATED)
MA ONYANGO, J
DECEMBER 2, 2022**

BETWEEN

KENYA WINE AGENCIES LTD APPELLANT

AND

LENNY KIMATHI MURUNGU RESPONDENT

JUDGMENT

1. The Respondent was an employee of the Appellant initially stationed in Kenya before being deployed to Uganda on transfer.
2. On November 9, 2015, the Appellant redeployed the Respondent back to Nairobi. This was with immediate effect. As the record shows, the Appellant's agents and or servants took control of the Appellant's office in Uganda by taking from the Respondent some of the keys to the said office. A Mr Tanui was posted to the Uganda office to take over its operations from the Respondent.
3. According to the letter of re-deployment, the Respondent was to be accorded free transport to Nairobi, the Appellant's Head Office. This communication was in line with clauses 31 and 32 the Appellant's Staff Regulations.
4. It is alleged that the Appellant did not facilitate the Respondent's travel in terms of the aforesaid regulations and letter of re-deployment. Consequently, the Respondent never reported to the Appellant's Head Quarters contrary to what had been directed. As a matter of fact, the evidence adduced by the Respondent suggests that he remained allegedly marooned in Uganda owing to alleged absence of means to travel.
5. The Respondent subsequently filed suit in 2006 in which he prayed for orders to compel the Appellant to pay him Kshs 220,000/- to cover his relocation expenses from Uganda to Kenya. In the amended Plaintiff dated March 5, 2013, the Respondent also claimed for an order that the Appellant pays him



- Kshs 2,415,838.50 being salary arrears for the period between November 2005 and July 2009. There was also a prayer for general and aggravated damages for breach of contract and inhuman treatment.
6. From the amended Plaintiff, the Respondent paints a picture of an individual who remained in employment perhaps until July 2009, the last month for which he has asked to be paid a salary. He however acknowledges that the failure by the Appellant to pay his salary constituted a breach of the contract of employment between the parties. He also acknowledges that from November 9, 2005, he did not report back to work at the Appellant's offices either in Uganda or Kenya.
 7. On its part, the Respondent filed a defense in which it averred that the Respondent was asked to report back to Nairobi immediately after 9th November 2005. He was to travel after handing over the Appellant's Ugandan office to the Appellant's appointed agent and or servant.
 8. According to the Appellant, the Respondent never handed over the office as directed. Instead he deserted duty. He never reported to the Appellant's Head Office as directed. In the Appellant's view, the Respondent "willfully and without leave or other lawful cause absented himself from his appointed place of work."
 9. After hearing evidence from the parties, the trial magistrate held that the Appellant did not plead that the Respondent's employment was summarily terminated or at all after he failed to travel to Nairobi as instructed in the Appellant's letter dated November 9, 2005. As a result, it was the court's view that the Appellant could not tender evidence to suggest that it had summarily terminated the Respondent as parties are bound by their pleadings.
 10. The court rejected the Appellant's letter suggesting that the Respondent was summarily terminated in June 2006 and proceeded to hold that there was no proof that the Respondent's contract of employment had been "formally" terminated.
 11. The court then entered judgment for the Respondent for Kshs 2,415,838.50 to cover salary for the period between November 2005 and July 2009. He also awarded the Respondent nominal damages of Kshs 100,000, aggravated damages of Kshs 50,000, costs of the case and interest.

The Case on Appeal

12. Dissatisfied with the decision, both parties appealed. From the grounds of appeal, the following issues emerge:-
 - a. Whether the trial magistrate erred in failing to find that the Respondent's employment was terminated.
 - b. Whether the trial magistrate was right in awarding the Respondent salary for the period spanning between November 2005 and July 2009.
 - c. Whether the trial court erred in awarding the Respondent nominal and aggravated damages of Kshs 100,000 and Kshs 50,000 respectively.
 - d. Whether the trial judge ought to have awarded the Respondent a higher sum than the Kshs 100,000 to cover loss of income up to January 26, 2021, the date of the court's decision.
 - e. Whether general and aggravated damages are awardable for breach of a contract of employment.
13. This is a first appeal. Consequently, it is to proceed by way of a retrial. The court is to re-evaluate the evidence on record and arrive at its own conclusion on the matter. However, as the court did not hear the witnesses, it must make allowance for this.



14. It is true as the trial court observed that parties are bound by their pleadings and that a party cannot adduce evidence to prove that which has not been pleaded. This is exactly what the Appellant tried to do by producing the letter dated June 29, 2006 to demonstrate that the Respondent had been summarily dismissed. To the extent that the Appellant had not expressly pleaded that the Respondent's contract had been closed through summary termination, I think that it was inappropriate for the Appellant to attempt to push the case for summary termination through production of the letter under reference.
15. However, it is common knowledge that like any other contract and save for the limitations that have been developed through statute and case law, contracts of employment are subject to the general principles of contract law. These principles include the general principles of repudiation and frustration of contract.
16. The Appellant contends that the Respondent was to report to its Head Office in Nairobi on redeployment immediately after November 9, 2005 but failed to do so. It was the Appellant's case that the Respondent disappeared from his work station after he had been asked to hand over to Mr Ishmael Tanui.
17. On the other hand, the Respondent contends that after he was asked to hand over the office keys to the Appellant's appointed agent and or servant, he was asked to stay away from the office until further communication. That he could not hand over as the individual he was to hand over to left for Nairobi and did not go back to the Uganda office. That in any event the Appellant's staff who came to Uganda took over all the records and stores including the company car before they left. Consequently, there was nothing left to hand over.
18. The Respondent stated that he was supposed to be cleared to travel to Kenya after handing over the Uganda office but there was nobody to oversee this exercise. He no longer had access to the office in Uganda as the keys had been taken over by the Appellant's appointed agents and or servants.
19. Whilst the Respondent states that his contract of employment was never terminated and that he only remained in Uganda and therefore away from his new work station because he had not been facilitated to travel to Nairobi, the Appellant argues that the Respondent deserted duty by failing to show up at the Appellant's office in order to hand over and be ferried to Nairobi in terms of the letter of redeployment dated November 9, 2005.
20. From the above facts, it is common ground that from November 9, 2005, the Respondent was no longer rendering services to the Appellant in terms of the contract of employment between the parties either as a result of desertion of duty or due to the failure by the Appellant to facilitate him to get to where he had been re-deployed. Further, it is clear that the Appellant stopped paying the Respondent's salary from November 2009. This scenario presents a picture of breach of fundamental terms of the contract of employment between the parties relating to provision of agreed services in return for pay.
21. In my view, the letter dated November 9, 2005 represents the only verifiable evidence of what the parties were to do between November 9, 2005 and the time the Respondent was to report to Nairobi. According to the letter, the Respondent was to hand over to the acting Export Manager who was to then clear him from the Uganda station and facilitate his release. Whilst the Respondent states that he failed to get to Nairobi because he was not facilitated, there is no evidence that he presented himself to the Appellant's Uganda office to hand over, be cleared and be facilitated as directed in the letter dated November 9, 2005. On the contrary, the internal memo issued on March 1, 2006 by one Ishmael Tanui, the Export Executive Kampala indicates that the Respondent never went to do the hand over forcing them to break the main door to gain access to the office.



22. At paragraph 70 of his witness statement, the Respondent suggests that he locked the inner padlock to the main entrance to his office whilst Mr Tanui locked the external padlock. At paragraph 67 of the statement, the Respondent suggests that he retained a key to one of the padlocks which was still in his custody at the time of writing the statement. Although he indicates he had handed over most of the padlock keys, the internal memo of March 1, 2006 suggests that he retained some keys that were critical to access to the office. Otherwise, what would be the reason for the action by the Appellant's staff to break into the office?
23. The essence of the above evidence is that the Respondent did not comply with the directives in the letter dated November 9, 2005. Instead, he kept off the handing over exercise resulting in the need to break the padlocks to the office. In fact during his cross examination, the Respondent stated that between November 9, 2005 and June 29, 2006, he did not report to work.
24. In my view, the Respondent's decision not to hand over and be cleared in terms of the directions in the letter of November 9, 2005 and to physically stay away from the Appellant's offices for more than six months (he says until June 29, 2006) constituted an act of repudiation of his contract of service. However, in terms of the pronouncement in [Luka Mbuvi v Economic Industries Limited \[2020\] eKLR](#), repudiation of a contract of employment only takes effect when it is accepted by the other party to the contract. What then constitutes acceptance in the circumstances of this case? Must acceptance be express or can it be inferred from the actions of the other party to the contract?
25. In my view, acceptance by a party of another's repudiation of a contract can be inferred from the conduct of the party accepting the repudiation. In the case before me, it is noted that the Appellant, in reaction to the Respondent's failure to report to its Uganda office to hand over: stopped paying his salary; issued him with a suspension; and even ultimately issued a letter of summary dismissal. These actions by the Appellant in effect spoke to the contract of employment between the parties having come to a close through repudiation and acceptance. By its actions, the Appellant was simply communicating that it accepted the Respondent's implied termination of his contract through his failure to clear from the Uganda office by, inter alia, withdrawing its obligation to pay his salary.
26. Premised on the aforesaid, it is my finding that the contract of service between the parties was terminated through repudiation and acceptance of the repudiation following the Respondent's failure to comply with the Appellant's direction in the letter dated November 9, 2005. It was therefore inappropriate for the trial court to hold that merely because the Appellant did not expressly terminate the Respondent, the contract of service between them remained alive.
27. In any event the Black's Law dictionary describes remuneration to mean payment or compensation for a service rendered by an individual. On the other hand salary is defined as agreed compensation for services. The Respondent readily admits that after the events of November 9, 2005, he never went back to work. In my view, it does not matter whether this was out of his free will or due to the failure by the Appellant to facilitate him. The fact of the matter remains that as at November 9, 2005, he stopped working. How would the Respondent have expected the Appellant to continue remunerating him for services not rendered irrespective of whether the Appellant was in breach of the contract of service?
28. I agree with the observation by Makau J in [Mary Saru Mwandawiro v Kenya Ports Authority \[2016\] eKLR](#) that a person alleging to be in the employment of another cannot expect to be paid for work not done. As the court observed, such proposition goes against public policy. It is contrary to the dictates of good conscience.



29. Both parties agree that as at November 9, 2005 when they ran into problems with implementation of their contract the applicable law was the *Employment Act* Cap 266 Laws of Kenya. Under this regime, the employer had no obligation to provide reasons for a decision to terminate an employee.
30. Further the measure of damages awardable to either party in the event of breach of an employment contract under the said statute was an amount equivalent to the notice to terminate period (see *Directline Assurance Co Ltd v Jeremiah Wachira Ichaura [2016] eKLR*). Under regulation 10 of the Appellant's Staff Regulations, the Respondent having been in the service of the Appellant for more than five years, the period of the notice to terminate their contract was two months. Therefore, in the event there was wrongful termination of the contract, the party in breach would be entitled to damages equivalent to the Respondent's salary for two months.
31. In this case, the Respondent repudiated his contract of service through his conduct of staying away from the Appellant's offices at Uganda despite having been required to hand over. He was therefore not entitled to salary equivalent to the notice period.
32. The general position in respect of contracts generally and for employment contracts terminated under the *Employment Act* 2006 is that general damages are not available as a remedy for their breach (see *Jacqueline Kiaraho v Co-operative Bank of Kenya [2017] eKLR* and *Directline Assurance Co Ltd v Jeremiah Wachira Ichaura [2016] eKLR*). In the premises, I find that the award of aggravated and exemplary damages by the trial court was without sound legal basis.

Determination

33. The appeal by the Appellant is allowed and the judgment of the trial court is set aside in its entirety.
34. The appeal by the Respondent is dismissed.
35. Each party to bear his/its costs.

DATED AND SIGNED ON THE 30TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

DELIVERED ON THE 2ND DAY OF DECEMBER 2022

B O M MANANI

JUDGE

