



REPUBLIC OF KENYA



KENYA LAW

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**Onyango v Trees for the Future INC (Cause E006 of 2023)
[2024] KEELRC 1353 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1353 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E006 OF 2023**

CN BAARI, J

JUNE 6, 2024

BETWEEN

FRED OPIYO ONYANGO CLAIMANT

AND

TREES FOR THE FUTURE INC RESPONDENT

JUDGMENT

1. Fred Opiyo Onyango (the Claimant) sued Trees for the Future Inc (the Respondent) via a memorandum of claim dated 20th January, 2023 seeking the following orders: -
 - a. A declaration that he was constructively dismissed.
 - b. A declaration that his termination was unfair and unlawful.
 - c. A total of Kshs 2,880,000/= in terminal dues and outstanding amounts from the remainder of contract.
 - d. Costs of the suit.
 - e. Interest on (c) and (d) above at the prevailing court rates.
 - f. Certificate of service.
2. The Respondent entered appearance on 28th February, 2023, together with a memorandum of response dated 22nd February, 2023, and filed on similar date.
3. In its response to claim, the Respondent denied the averments in the memorandum of claim, and contended that the Claimant was both substantively and procedurally dismissed in line with Sections 41 and 45 of the *Employment Act*, 2007.



4. Despite the matter having been referred to mediation, counsel for the Claimant expressed reservations on the basis that the matter had already been fixed for hearing.
5. The Claimant's case was heard on 4th October, 2023, when he testified in support of his case. The Respondent presented three (3) witnesses who were all heard on 24th October, 2023.
6. Both parties filed written submissions in support of their respective cases.

The Claimant's Case

7. It is the Claimant's case that he was employed as the Respondent's Country Accountant on 1st January, 2022, on a 1-year fixed term contract at a salary of Kshs 121,495/=. He further avers that his salary was subsequently increased on 21st September, 2022 to Kshs 160,000/=.
8. It is his case that he dutifully and diligently carried out his duties until 6th December 2022, when he was summarily dismissed. He affirms that there was no apparent reason for the dismissal and that he was condemned unheard.
9. The Claimant contends that his dismissal amounted to an unfair labour practice.
10. It is the Claimant's further case that the so-called disciplinary hearing that was under-taken, was a charade orchestrated by the Respondent to get rid of him unprocedurally.
11. In his oral testimony, the Claimant avers that he missed the first disciplinary hearing for reason that he was unwell and was hospitalized. He states that a second disciplinary hearing was scheduled, which he confirmed attending, and avers that he was faced with the charge of absconding duty which did not form part of the charges listed in the notice to show cause letter.
12. It is his case that he unknowingly disbursed money to suspended staff on the 3rd and 5th of October, 2022, as the notice to stop the disbursement was sent to him on 7th October, 2022, when the money had already been released.
13. The Claimant refutes having absconded duty as he was discharged from hospital on 26th October, 2022.
14. On cross-examination, the Claimant confirmed that his contract was to end on 31st December, 2022, and that he still had 25 days to work at the time of summary dismissal.
15. He further confirmed that the reason for his dismissal was for absconding duty and that he was cleared of the charge of releasing the Respondent's funds.
16. The Claimant asserts that the questions on absconding duty were put to him during the disciplinary hearing, and which questions he was able to answer. He further told court that he did not present his hospital admission documents during the disciplinary hearing.
17. He confirmed further that his name was not on the work attendance register presented by the Respondent for 18th and 19th October, 2022 and 15th, 16th, 17th and 18th November, 2022. He told Court that he was admitted to hospital on 17th November and discharged on 23rd November, 2022.
18. It is the Claimant's evidence that he understood the procedure to follow when he was not able to attend duty due to ill health, but that he was too ill to call.
19. The Claimant confirmed that his contract did not provide for payment for the remainder of the term, should the contract be terminated prematurely.
20. It is his prayer that the Court grants him the reliefs in his claim.



The Respondent's Case

21. The Respondent's case is that the Claimant had disciplinary issues that led to his dismissal. It avers further, that despite being entrusted with dealing with the Respondent's bank accounts, he irregularly disbursed company funds to employees on administrative leave.
22. This illegal disbursement the Respondent avers, led to service of a notice to show cause on 14th of November, 2022, and the blocking of the Claimant's access to the bank accounts.
23. It is the Respondent's further case that it found the Claimant's reply to the notice insufficient, and invited him for a disciplinary hearing on 25th November, 2022.
24. The Respondent asserts that it sent the invitation to the Claimant's personal email, his WhatsApp number and through registered post, but the Claimant did not respond to the show cause letter.
25. It is the Respondent's case that a review of the Claimant's leave records revealed that he had absconded duty on a number of occasions and had failed to provide medical records for the 24th to 26th October, 2022, when he was not at work.
26. The Respondent contend that it rescheduled a second disciplinary hearing when the Claimant did not attend the first one, and sent out a second invite to the Claimant.
27. It states that the Claimant attended the second hearing after which it reached the decision to dismiss him from service for failure to apply for leave, failure to notify the employer of his whereabouts on the days when he absented himself from duty, and for failure to provide evidence of illness on the days he was absent.
28. The Respondent through RW1-Pius Odawa, told the Court that the contract the Claimant presented in evidence was different from the one it issued him and spelt out the outstanding difference as the letter heads, gross salary payable, contract renewal clause and the header amongst others. It is its case that based on these differences, the Claimant is not entitled to the remedies sought.
29. RW1 further told court that the Claimant was paid his terminal dues. He states that the Claimant's salary was adjusted severally and by September, 2022, it stood at Kshs. 160,000/-
30. RW2, a document examiner, told the Court that the contract document produced in evidence by the Claimant was different from the one produced by the Respondent. It is his evidence that the two documents were not printed from the same source.
31. RW3's evidence is that the dismissal letter issued to the Claimant indicated the reasons for the dismissal as being failure to comply with command and for absconding duty.
32. RW3 further told this Court that the Claimant mentioned having been unwell for the first time during the disciplinary hearing. He states that the Claimant did not inform the office/Respondent that he was unwell before, and hence the charge of absconding duty.
33. The Respondent prays that the Claimant's suit be dismissed with costs.

The Claimant's Submissions

34. The Claimant submits that the Respondent had not justified his dismissal as stipulated by Section 45 of the [Employment Act](#). He asserts that the 3-day notice was too short given his sickness. Additionally, he asserts that an avenue for appeal of the dismissal was not availed to him.



35. He affirms that the dismissal did not pass the procedural fairness test, hence he is entitled to the remedies sought.
36. It is the Claimant's further submission that the Court should award him costs on the strength of the general rule that costs follow the event.

The Respondent's Submissions

37. The Respondent submits that the Claimant did not resign from their service, hence cannot claim constructive dismissal. It relies on the Court of Appeal decisions in *Coca Cola East Africa LTD v Maria Kagai Ligaga* (2015) eKLR and *Milton M Isanya v Aga Khan Hospital Kisumu* (2017) eKLR, where resignation was cited as a vital ingredient for constructive dismissal.
38. The Respondent reiterates that it had good reason to summarily dismiss the Claimant for disobeying lawful instructions and for failure to explain his absence from work. It urges this court to consider the fact that the Claimant neither raised the issue of illness in response to the Notice To Show Cause nor in his email requesting a rescheduling of the disciplinary hearing.
39. On the contrary, the Respondent submits that the letter requesting a rescheduling of the disciplinary hearing alluded to the Claimant attending a burial and not that he was sick.
40. It is the Respondent submission that absence from work without leave was a ground for summary dismissal under Section 44 (4)(a) of the *Employment Act*. Reliance is placed on *Consolata Kemunto Aming'a v Milimani High School* [2019] eKLR, where the court in relying on Section 44 (4) above dismissed the Claimant's suit for absenteeism without good cause. Further, reliance was had on *Luka Mbuvi v Economic Industries Limited* [2020] eKLR, where desertion was described as a repudiation of the contract.
41. In respect of the procedure employed, the Respondent submits that the Claimant was issued with a notice to show cause which he responded to, and attended a disciplinary hearing in which he made representations.
42. It asserts that it had met the procedural fairness test stipulated in the Court of Appeal case of *Postal Corporation of Kenya v Andrew.K. Tanui* [2019] eKLR, where the court delineated four elements for procedural fairness as follows: -
 - i. An explanation of the grounds of termination in a language understood by the employee;
 - ii. The reason for which the employer is considering termination;
 - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - iv. Hearing and considering any representations made by the employee and the person chosen by the employee.
43. The Respondent further submits that the Claimant had forged his contract to indicate that he was earning Kshs 121,495.50/=, yet the payslips clearly showed that his basic salary was Kshs 117,958/=.
44. As to whether the Claimant is entitled to the remedies sought, the Respondent submits to the negative. It re-emphasises that damages cannot be issued on the basis of forged documentation.



Analysis and Determination

45. Upon careful appraisal of the pleadings herein, evidence adduced, oral testimony and submissions, the following issues crystalize for determination.
- i. Whether the Claimant was constructively dismissed and if not
 - ii. Whether he was fairly dismissed.
 - iii. Whether he is entitled to the remedies sought.

Whether the Claimant was constructively dismissed

46. In his pleadings, the Claimant prominently sought a declaration that he was constructively dismissed. He however did not lead any evidence nor testify in support of this prayer.
47. In *CMC Aviation Ltd. vs. Cruisair Ltd.* (No. 1) [1978] KLR 103; [1976-80] 1 KLR 835 Madan J (as he then was) opined thus: -
- “Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”
48. For the foregoing reason, this court returns the finding that no concrete evidence was adduced to support the claim of constructive dismissal.
49. In any case, there is no evidence that the Claimant resigned as a result of a hostile work environment. (See *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR). The Claimant was instead taken through a disciplinary process that culminated in his summary dismissal.
50. There is therefore no iota of evidence to support a possibility that the Claimant could have been constructively dismissed, and is probably the reason he abandoned this assertion along the way.
51. I find and hold that the Claimant was not constructively dismissed.

Whether the Claimant was unfairly dismissed

52. Section 41 of the *Employment Act*, 2007 demands that before terminating an employment contract on the grounds of misconduct, poor performance or physical incapacity, the employer must grant the employee an opportunity to make representation, either in the presence of a colleague or representative of a trade union.
53. It is not disputed that the Claimant was issued a notice to show cause letter dated 4th November, 2022, detailing the reasons why the Respondent was considering his dismissal.
54. Parties further are in agreement that the Claimant responded to the show cause letter vide his letter of 16th November, 2022, and was thereafter invited for a disciplinary hearing via the letter dated 21st November, 2022. It is also evident that a disciplinary hearing took place on 1st December, 2022 at the Respondent’s main office in the presence of the Claimant.



55. The Claimant contends that the charge of absconding duty and which is the reason for his dismissal, was not put to him in the notice to show cause, and that he only learnt about it during the hearing.
56. I note however, that the Respondent's second invite for disciplinary hearing, carried a further charge of failing to attend work without permission, and for which the Claimant was required to respond to and further submit on during the physical hearing.
57. In the case of Philip Kimosop v Kingdom Bank Limited (2022) eKLR, the Court opined that the Respondent's action of serving a show cause letter to the Claimant, inviting the Claimant to an oral hearing, giving the Claimant the right to call witnesses, produce documents and also be represented by another employee at the hearing constituted fair procedure. The Court emphasized that all these steps taken by the Respondent prior to terminating the Claimant's employment qualified as following due procedure as contemplated under Section 41 of the [Employment Act](#).
58. Further in Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR, the Court had this to say on fair process:
- “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.
- Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
- Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”
59. The Claimant herein, was issued with a show cause letter, he responded to the show cause and appeared before a disciplinary committee for the hearing of his case. It is also true that the letter inviting the Claimant for the hearing, informed him of his right to have a representative of his choice present, but elected not to avail one.
60. From the foregoing, it is evident that the Respondent substantially adhered to the dictates of procedural fairness.
61. I thus find and hold that the Claimant's dismissal is procedurally fair.
62. The second limb in determining whether an employee's dismissal is fair, is the substantive fairness test enshrined in Sections 43, 45 and 47(5) of the [Employment Act](#). These provisions demand that an employer proves the reasons for termination/dismissal, prove that the reasons are valid and fair and further prove that the reasons are justified.
63. The reason for the Claimant's summary dismissal as gleaned from the summary dismissal letter, is for absconding duty. The other grounds forming the charge sheet were dropped on the premise that the Claimant substantially and sufficiently responded to the issues.
64. In trying to explain his absenteeism, the Claimant cited his debilitating illness and constant hospitalization. In cross-examination he acknowledged being absent from work on 18/10/2022,



19/10/2022, 15/11/2022, 16/12/2022, 17/11/2022 and 18/11/2022. He equally acknowledged that he knew the procedure to be followed in case of sickness, but which he did not follow.

65. The Claimant further confirmed that he did not inform the employer/Respondent that he was unwell, and that the allegation of illness only came up during the disciplinary hearing and yet again, no supporting documents were produced even when the Claimant was aware that he would be responding to the issue of absenteeism.
66. Section 44 (4) (a) of the *Employment Act* lists absenteeism as one of the reasons that justifies a summary dismissal. In the circumstances of this case, the Claimant's unexplained absence from duty for an entire 6 days, justifies the Respondent's action.
67. I conclude by holding the Claimant's dismissal both procedurally and substantively fair.

Whether the Claimant is entitled to the remedies sought.

68. The Claimant sought a declaration that he was constructively dismissed, a declaration that his termination was unfair, a total of Kshs 2,880,000/= in terminal dues and outstanding amounts from the remainder of his contract, costs of the suit, interest and a certificate of service.
69. Having found that the Claimant's dismissal was procedurally and substantively fair, it follows that he is not entitled to payment for the remainder of contract, costs of the suit and interests thereon.
70. I further hold that the Claimant is entitled to receive his terminal dues in the sum of Kshs. 240,000, if the same was not already released to him.
71. The record shows that the Claimant was issued with a certificate of service and he is at liberty to collect the same if he has not already done so.
72. The Claimant's claim is thus dismissed.
73. The Claimant shall bear the costs of the suit.
74. Judgment of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF JUNE, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Mbeka h/b for Mr. Vincent Otieno for the Claimant

Ms. Kasioka h/b for Mr. Gachaga for the Respondent

Ms. Anjeline Wanjofu- C/A

