



Shiunzi v Nyali Academic Services Limited t/a the Mombasa Academy (Cause E122 of 2023) [2024] KEELRC 1415 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1415 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E122 OF 2023
M MBARÚ, J
MARCH 20, 2024

BETWEEN

NOAH HAJI SHIUNZI CLAIMANT

AND

**NYALI ACADEMIC SERVICES LIMITED T/A THE MOMBASA
ACADEMY RESPONDENT**

JUDGMENT

1. The claimant was employed by the respondent, a limited liability company running The Mombasa Academy school. The claimant was employed on 1st September 2020 as a History and Kiswahili teacher on a contract issued at the end of each academic year. His monthly salary was Kshs 100,000.
2. The claim is that on 13 August 2023 when the claimant was at home during the holidays, he was involved in an accident and injured his spinal cord. On 28 August 2023, all teachers of the respondent were expected to report to work for preparation and resumption of teaching but owing to serious injuries, the claimant informed the respondent's Deputy teacher Mr Manyasa that he would be unable to attend. He sent a medical report from Coast General Hospital dated 27 August 2023.
3. On 2 September 2023, the respondent removed the claimant from the staff WhatsApp group. This meant he was no longer a member of staff.
4. On 5 September 2023, the claimant reported to work to discuss possible issuance of sick leave to be able to recover from his injuries. He was informed that the respondent had decided to terminate his employment. The reason was that he had failed to attend a teachers meeting and that he had been replaced by another teacher. The Deputy Head teacher advised him to go back home since the respondent had no other vacancy.
5. On 7 September 2023, the claimant received letter posted in the respondents D6 Portal which indicated that he had been replaced by another teach to teach his subjects. This resulted in termination of



employment without due process or payment of terminal dues. The claimant had no notice to show cause issued to allow him a fair hearing. The claim is for terminal dues;

- a. 3 months' notice pay Kshs 300,000;
 - b. 10 months' pay for unspent contract Kshs 1,000,000;
 - c. 12 months' compensation Kshs 1,200,000;
 - d. Gratuity pay for 36 months Kshs 125,208;
 - e. Service pay for 3 years Kshs 150,000;
 - f. Certificate of Service;
 - g. Costs.
6. The claimant testified in support of his case that on 13 August 2023, while on vacation, while cutting a tree he fell and injured his spinal cord. He was admitted in hospital and submitted a letter to the deputy head teacher. There was a planned meeting on 28 August 2023 for teachers before schools reopened for preparations and he could not attend due to his injuries. He kept in communication with the deputy head teacher. He got a medical letter from the hospital and submitted to the deputy head teacher but there was no response. The meeting was held and his colleagues informed him that his position had been advertised.
7. The claimant testified that on 5 September 2023 schools opened for the terms and he reported to work but on 29 August 2023 the deputy head teacher had already removed him from the staff WhatsApp group. When he asked for his salary for the month, he was told at the accounts office that his position had already been filled and the due salary for August 2023 was not paid. The deputy head teacher told him that since he was not at school on 28 August 2023, he had absconded duty and deserted his employment. This was not true since he had communicated his ailments and need to recuperate. Employment terminated unfairly, it was not justified and the claims made should be awarded.
8. In response, the respondent admitted that the claimant was employed as a teacher in the school. He had a fixed term contract of one year from 1st September 2022 to 30 June 2023. At the end of the contract, the respondent offered to renew the contract and through letter dated 28 April 2023 the claimant signed a new contract dated 2 June 2023 which was to run until June 2024.
9. The claimant submitted a doctor's note from Dr. S.A. Mohamed Hatimy which stated that he was diagnosed with a spinal cord injury at Coast General Hospital and was under medical review. The claimant also informed the respondent that he was travelling to Kakamega from Mombasa where he had been advised to seek specialised medical treatment for spinal injury. The respondent asked the claimant to bring a report from Avenue Hospital which is the designated hospital for all employees but the claimant failed to comply. Since, the claimant refused to report to work.
10. The response is also that upon enquiry and after failing to trace the claimant, the respondent discovered that the claimant had moved all his personal belongings and relocated to Kakamega. This prompted the respondent to inquire on the veracity of the alleged injury and the doctor's note. The respondent was able to ascertain from Coast General Teaching and Referral Hospital that the doctor's note is fake. It bears a fake stamp. Such doctor has never been employed in the hospital and there is no record of the claimant being treated.



11. The claimant was found to be dishonest about his alleged injury and had lied to the respondent with the aim of unilaterally breaching his contract obligation after renewal through letter dated 2 June 2023. He did not issue notice before termination of contract.
12. There was no unfair termination of employment as alleged. The claims made are not justified and should be dismissed with cost.
13. In evidence, the respondent called Andrew Munyasa who testified that he is the head teacher of the respondent with authority from the respondent to respond to the claim herein. The claimant was an employee and on 27 September 2023, he called in to state that he had suffered an injury and was being attended to by Dr. S.A Mohamed Hatimy. He submitted a medical note to the effect that he was on treatment for spinal cord injury at Coast General Etching and Referral Hospital. The claimant also called him and stated that he was travelling to Kakamega to seek treatment for the spinal injury.
14. Mr Manyasa testified that he asked the claimant to submit a medical report form Avenue Healthcare which is the designated healthcare facility for the respondent's members of staff. The claimant declined and also refused to report back to school. He made further inquiries and discovered that the claimant had moved out of his residence to Kakamega. This prompted him to further inquire about the injury and medical note submitted and it was discovered that Coast General Teaching and Referral Hospital had no doctor under the name of S.A. Mohamed Hatimy and the claimant had not been treated in the facility. The medical note was fake and the stamp was fake.
15. Manyasa also testified that there was no communication that employment had been terminated. The claimant chose not to attend work on his own volition. Effectively he absconded duty well aware that he had benefited from several school holidays with 31 days during December vacation, 14 days in April and 62 days during July/August vacation including the midterm breaks. The claims made are not justified.
16. At the close of the hearing, parties agreed to file written submissions. Both are analysed and the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies sought should issue.
17. The respondent has not issued the claimant with a letter terminating his employment. The claimant was on a contract running from 2 June 2023 to June 2024. Mr Manyasa for the claimant testified that the claimant absconded duty and refused to report back on 28 August 2023.
18. The claimant asserts that he suffered spinal cord injury in August 2023 and could not report back to work.
19. An employee does not terminate his own employment. Where the employee absconds duty or remains absent for no good cause, the legal duty is on the employer to issue the subject employee with notice in accordance with Section 44(3) and (4) of the *Employment Act*, 2007 (the Act). Absconding duty or being absent from work without good cause is defined as gross misconduct. The employer is allowed to summarily dismiss the employee. However, the employer must demonstrate that efforts were taken to bring the employee to account in accordance with Section 41(2) of the Act. That is, notice issued to the employee to attend and make representations as to his gross misconduct.
20. In the event the employee fails to attend, the employer is not without recourse. Summary dismissal notice must issue and the same copied to the Labour Officer for the area in accordance with Section 18 (5)(b) of the Act. Such notice must issue within 7 days from the date the employer took action against the employee said to have absconded duty or is absent from work without good cause.



21. In this case, the claimant asserts that he got injured and was attended to at Coast General Teaching and Referral Hospital. His attending doctor is S.A. Mohamed Hatimy. The respondent made an inquiry and established that the hospital has no such doctor.
22. The response that the respondent allows its employee to be treated at Avenue Healthcare facility is also not contested. There is communication between the claimant and the respondent to the effect that he was leaving for Kakamega to receive specialised treatment for spinal cord injury. The respondent advised him to seek treatment at Avenue medical facility the facility recognised by the respondent. The claimant has filed these details in his Memorandum of Claim.
23. Under the Act, the employer is required to allow an employee to take sick leave subject to the employee submitting a Medical Certificate from a recognised health facility. The respondent had secured Avenue Healthcare to provide its employees with medical services. There was hence the authorised facility under which the claimant ought to have sought for medical attention and services in accordance with Section 30 of the Act.
24. In the case of *Catherine Mugure v Hillcourt Hotel & Spa Limited* [2019] eKLR the court held that Section 30 and 34 of the Act, requires an employee who is sick or requires medical attention to enjoy such right subject to notice to the employer and submissions of a medical certificate to confirm sickness and need for time off work.
25. In the case of *BIFU v Barclays Bank of Kenya* [2014] eKLR the court held that an employee who is absent from work on the reasons that he is sick is required to support such absence with a medical certificate. He must submit the same to the employer upon return to work.
26. Equally, in the case of *Simon Ngugi Kamau v Silpark Industries Limited* [2014] eKLR the court held that an employee who is absent from work due to sickness has a good cause/reasons for such absence, however the employer has to be informed of such cause and or reasons for approval and permission.
27. The claimant submitted the medical note from S.A. Mohamed Hatimy. It has since been established this is not a medical practitioner at Coast General Teaching and Referral Hospital. The contest by the claimant is neither here nor there because, the respondent as the employer had made provision for him to attend at Avenue Healthcare and he engaged Mr Manyasa who directed him to attend accordingly. He failed to oblige. At the time of the hearing of his claim, the claimant had not filed any Medical Certificate from a recognised health facility. His failure to attend work is not justified and he cannot justify a claim that his employment was terminated unfairly.
28. In the case of *Hatari Security Guards Ltd v Odongo* (Appeal E012 of 2022) [2023] eKLR the court held that where the employee is absent from work without permission, upon return, he is required to explain his circumstances. Otherwise, such is gross misconduct subject to summary dismissal. In *Richard Kiplimo Koech v Yuko Supermarket Ltd* [2015] eKLR the court held that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the *Employment Act* obtain. The court held that;

Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the *Employment Act*, 2007, a hearing is necessary.

And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the *Employment Act*,



2007. A prudent employer such as the Respondent will invariably keep contact details of its employees.

In this case, the claimant reported he was unwell. he had contact with the respondent as the employer. He was advised to seek medical attention at the authorised provider. The respondent played its role as required.

29. The claimant does not deny that on 28 August 2023 he did not report back to work. His explanation is that he was unwell. However, there is no evidence of such matter. His assertions that he reported back on 5 September 2023 is without evidence.
30. Even where the employer has the legal duty to issue notice to the claimant when he remained absent, the only relief due was for the claimant to claim payment of his salaries for days worked. Absence from work without due cause or permission from the employer or a proper medical issue certified through a Medical Certificate is addressed under Section 44(4)(a) of the Act as being gross misconduct and subject to summary dismissal.
31. The claimant is seeking to be paid for the remainder part of his employment contract. He has not resumed work from 28 August 2023 or provided a Medical Certificate over his alleged illness. He cannot benefit where he failed to plant good seeds by offering his labour. The claimant frustrated his own employment well aware that the respondent had a medical cover with Avenue Healthcare. He cannot justify his movement to Kakamega for other specialised treatment so as to benefit while outside the workplace.
32. Notice pay and compensation are remedies removed from the claimant after frustrating his employment.
33. On the claim for service pay, under the claimant's employment, provision for medical care at Avenue Healthcare insulated the respondent against claims pursuant to Section 35(5) and (6) of the Act. At the core of these provisions is to ensure the employee is secured when sick or ill and requires medical attention.
34. On the claim for payment of gratuity, such is not a term under the contracts of employment. It cannot be inferred from the court reading of the two contracts issued to the claimant.
35. The only sanction against the respondent is the lapse to report the absence of the claimant to the Labour Officer. This can only be prosecuted by such officer as held in *Nyali International Beach Hotel v Mpe Shindo Bundi & 146 others* [2017] eKLR. The jurisdiction to prosecute labour offences is vested upon the labour officer.
36. The respondent shall issue the requisite notice to the Labour Officer together with the Certificate of Service for the period the claimant worked for the respondent. On this account, each party to bear own costs.
37. Accordingly, the claim herein is found without merit and is hereby dismissed. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

