



**Kithuku v Toyota Tsusho East Africa Limited (Cause 1410 of 2018)
[2024] KEELRC 1501 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1501 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1410 OF 2018**

**J RIKA, J
JUNE 14, 2024**

BETWEEN

DAMARIS NGINA KITHUKU CLAIMANT

AND

TOYOTA TSUSHO EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim, on 28th September 2018. She avers that she was employed by the Respondent, as an Accounts Assistant, on 31st January 2014.
2. She was confirmed on 1st May 2014, after serving 3 months under probation.
3. The Respondent summarily dismissed her on 26th July 2018, on allegations of failure to follow her supervisor's instructions; failure to attend meetings; failure to review management objectives; and persistent absence.
4. She was denied annual and sick leave; and, subjected to inhuman and degrading treatment.
5. Her last gross monthly salary, was Kshs. 86,817.
6. She claims: -
 - a. Declaration that termination was unfair and unlawful.
 - b. 1-month salary in lieu of notice at Kshs. 86,817.
 - c. 12 months' salary in compensation for unfair termination at Kshs. 1,041,804.
 - d. Leave pay.
 - e. Costs.



- f. Interest.
- g. Certificate of Service to issue.
7. The Respondent filed its Statement of Response on 8th November 2018. It is conceded that the Claimant was an Employee of the Respondent. She was always treated fairly and respectfully. She was dismissed fairly and lawfully. She had received several warnings. It is denied that the Claimant is entitled to the prayers sought. The Respondent prays the Court to dismiss the Claim with costs.
8. The Claimant gave evidence, and rested her case, on 24th February 2023. On 6th February 2024, Parties consented that the witness statement made by Juliana Mutile for the Respondent, is admitted as the evidence of the Respondent. The Claim was last mentioned on 4th April 2024, when the Parties confirmed filing and exchange of their submissions.
9. The Claimant adopted her witness statement and 9 documents [1-9], in her evidence-in-chief. She told the Court that she was fresh from the University, when recruited by the Respondent. She restated her employment history, highlighting her terms and conditions of service, and the circumstances leading to her dismissal by the Respondent.
10. She agreed that warning letter had issued, but on different matters. She was alleged to have failed to follow her supervisor's instructions. She was alleged to have taken leave without authorisation. The thrust of her disagreement with the Respondent was on annual leave. She applied multiple times, without being let go. She was entitled to 24 days annually. She asserted her right to take annual leave.
11. Juliana Mutile states that she is the Respondent's General Manager-Accounting. She confirms that the Claimant was employed by the Respondent as an Assistant Accountant, and dismissed for gross misconduct. She was always treated respectfully. She was in the habit of applying for leave suddenly, or failing to report to work at the peak of the Respondent's business. This was in breach of contract and policy. She took annual leave without fail. She was accorded an opportunity to defend herself, as shown in the minutes of the pre-dismissal hearing. She was paid all her dues.
12. The issues are whether the Claimant's contract was terminated fairly, following a fair procedure, and for valid reason or reasons, pursuant to Sections 41 and 43 of the Employment Act; and whether the Claimant merits the prayers sought. The governing law is located in Sections 41, 43, 45, 47, 49 and 50 of the Employment Act.

The Court Finds

13. There is no dispute concerning the employment date of the Claimant, the terms and conditions of employment, and that she was dismissed by the Respondent on 26th July 2018.
14. The letter of summary dismissal states that the Claimant constantly failed to follow her supervisor's instructions. She was also said to have failed to participate, in performance management meetings. She was found to have been persistently absent from duty, without authorisation.
15. There were multiple letters of warning issued to the Claimant, relating to unauthorized absence, and insubordination, prior to the disciplinary hearing on 26th July 2018.
16. Her problem with the Respondent, as stated by her, appears to have originated in the Respondent's reluctance to let her go on annual leave. Her contract entitled her to 24 days of annual leave.
17. On 17th May 2018, she wrote to the Respondent through e-mail, underscoring that she was entitled to 24 days of annual leave. She complained that her annual leave application, were rarely approved. She



- was disadvantaged by non-approval, because the policy was that she could only carry forward 15 days. She told the Respondent bluntly, that she would complete assigned tasks, and proceed on annual leave.
18. Juliana replied, advising the Claimant that annual leave is taken, at the convenience of the Employer. The Claimant was reminded that she needed the approval of the Respondent to go on annual leave.
 19. Between 23rd and 25th July 2018, the Claimant took unauthorised annual leave. She had been warned by Juliana that disciplinary action would be taken against her, if she went on unauthorized leave. She wrote to Juliana, bluntly telling the Respondent that she was already on leave, and had planned to be away, and there was no way she would cancel her leave. She had been informed in writing that her application for leave was not approved. She was informed that her colleague John, was away on annual leave, and he would return on 25th July 2018. She was at liberty to apply for leave after John returned. The Claimant also wrote an e-mail dated 16th July 2018, in close proximity to her unauthorized leave, informing the Respondent that she was unwell, and “not coming to work today.”
 20. Section 28 of the *Employment Act* allows Employees annual leave of a minimum of 21 days, after every 12 consecutive months. Section 28 [5] states that where an Employee is entitled to annual leave in excess of 21 days, the Employer and the Employee may agree on how to utilize the leave days.
 21. The Claimant was adequately advised by the Respondent, and warned that she could not just take leave, without the consensus of the Respondent. She was advised that her colleague John was away, and would return on 25th July 2018. She would be free to go after this. The Claimant was intransigent, taking unauthorized leave, and leaving her accounting docket, unattended. While the law confers annual leave entitlement of Employees, it is not to be exercised unilaterally. It must be mutually timed, so as not to disrupt production. The Respondent must have adequate notice, so as to engage a reliever.
 22. If the Claimant was frustrated at repeated non-approval of her leave application, she ought to have engaged the Respondent’s grievance policy, not take matters in her own hands, and just leave.
 23. Her own leave application form dated 28th February 2018, indicates that she was owed a balance of 16.5 annual leave days. This is not indicative of an Employee who had been denied annual leave persistently. In her Claim, she does not specify the number of annual leave days owed, simply stating she prays for accrued leave pay.
 24. On procedure, the minutes exhibited by the Respondent marked ‘JM8’, indicate that the Claimant was heard by a committee comprising the Divisional General Manager, the General Manager- Accounting, and Assistant Human Resource Manager. She was given an opportunity to make her representations and advised on her right to be accompanied by a colleague of her choice. She did not attend hearing in the company of a colleague. When presented with the charges on unauthorized leave and insubordination, she replied that she would only reply to the charges, in the presence of her legal representative. She refused to engage and a decision was made to summarily dismiss her.
 25. Procedure was fair, in accordance with Sections 41 and 45 of the *Employment Act*.
 26. The reasons given in justifying dismissal were valid, under Section 43 and 45 of the *Employment Act*.
 27. The Claimant caused or contributed in a large measure, to the circumstances leading to dismissal. She wrote her own obituary.

It Is Ordered

- a. The Claim is declined.
- b. No order on the costs.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,
UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT
PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

