



**Wandera v Agility Logistics Limited (Cause 323 of 2016)
[2023] KEELRC 1083 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 323 OF 2016**

**SC RUTTO, J
APRIL 28, 2023**

BETWEEN

SILVESTER BWIRE WANDERA CLAIMANT

AND

AGILITY LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. The employment relationship is not contested. The dispute is the manner in which the employment relationship was severed. According to the Memorandum of Claim filed on 2nd March, 2016, the Claimant avers that he was terminated from employment on 3rd March, 2015 following a traffic accident in which he sustained severe injuries. He has termed his termination from employment as premeditated. Consequently, the claimant seeks against the respondent the sum of Kshs 318, 123.10 being notice pay, compensatory damages, house allowance, overtime pay and untaken leave days.
2. Through its Response filed on 6th December, 2016, the respondent avers that following the claimant's accident, he resumed work on his own volition in November, 2014 but was not able to carry on his normal duties hence left and did not apply for sick leave nor seek extended sick off. It is the respondent's case that it could not keep a deserter on its payroll who never bothered to follow procedure or communicate. The respondent has thus denied terminating the claimant unfairly and has asked the Court to dismiss the suit with costs.
3. The matter proceeded for hearing on diverse dates being 23rd March, 2022, 16th June, 2022 and subsequently on 27th October, 2022 when trial closed. During the hearing, each side called oral evidence.



Claimant's case

4. The claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He also produced his bundle of documents filed together with the claim as exhibits before Court.
5. It was the claimant's testimony that on 4th August, 2014, he was carrying out his duties of distributing goods to the respondent's various clients riding motor cycle registration number, KMCG 7574Z, when the said motorcycle hit a bump and rolled several times hence he sustained injuries. He was rushed to Guru Nanak Hospital where he was admitted for one week. On 16th October, 2014, he was taken to Nairobi West Hospital where he was admitted for 3 days. On or about the end of October, 2014, he was recalled by the respondent to resume work but he was not able to do so as he was still on crutches. In November, 2014, he went back to work and worked for only 3 days but he could not "kick" nor start the engine due to severe pain. He informed the respondent of his predicament in continuing with work at that point in time and he was allowed to go home and report back to work when he got better.
6. The claimant further testified that on or about the end of February, 2015, a Mr. Muriuki from the respondent called him and asked him for his postal address. To his surprise, the respondent sent him a dismissal letter in the month of March, without considering his predicament. He terms his dismissal as predetermined as he was dismissed before being given a show cause letter that required him to appear and explain his situation at a hearing slated for 21st April, 2015.
7. He stated that the show cause letter exhibited by the respondent was never served on him and he was not paid his terminal dues. He further stated that he was not compensated for the injuries he sustained. His efforts to resolve the dispute amicably through his advocates did not yield any fruits hence the instant suit. He was shocked and traumatized by the fact that instead of the respondent minding about his pain and suffering as a result of the accident, it instead dismissed him from employment.

Respondent's case

8. The respondent tendered oral evidence through its Human Resource Manager, Ms. Joyce Kariuki Mwangi, who testified as RW1. At the outset, she adopted her witness statement and the respondent's bundle of documents to constitute her evidence in chief.
9. RW1 told Court that the respondent catered for the claimant's medical expenses and follow up therapy. The claimant was recalled back to work in October, 2014 but he indicated that he was not in a position to resume work. He later resumed work in November, 2014, on his own volition but was not able to carry on his normal duties as required. The claimant thereafter left the work place without applying for leave or seeking extended leave.
10. It was RW1's further evidence that after absenting himself from work for long without communication, a show cause letter was sent to the claimant's address inviting him to appear on 21st April, 2015 at the respondent's offices to explain why disciplinary action should not be taken against him for desertion.
11. RW1 further testified that the alleged letter of termination does not make sense as it is not logical to send a show cause letter inviting the claimant to attend a hearing on 21st April 2015 and send him a termination letter the same day. The respondent does not know how it was generated. It is strange that that the claimant could have received a fake letter through the proper address box and not the actual letter with evidence of posting.



12. The claimant never showed up on the appointed date and has never appeared at the respondent's premises at all to clear and collect his terminal dues together with his certificate of service.

Submissions

13. Both parties tendered written submissions upon close of the hearing. It was submitted on behalf of the claimant that the respondent posted the notice to show cause dated 3rd March, 2015 on 17th April, 2015 calling him for a disciplinary hearing on 21st April, 2015 hence he only had 3 days to make a response. It was further submitted that it cannot be said to be procedurally fair that an employer hangs on to a notice to show cause letter for one month and 14 days and serve it 3 days to the alleged disciplinary meeting.
14. It was the claimant's further submission that no policy requiring sick leave was displayed for the Court's benefit. That it is clear that the respondent had no requirement for written sick leave as required under Sections 9 and 10 of the *Employment Act*. The Court was urged to find that the claimant's termination was unfair and unlawful within the meaning of Section 45 of the *Employment Act*.
15. On the other hand, the respondent urged that the claimant was not unfairly dismissed and that he deserted work without leave and did not communicate. That this does not amount to termination and or dismissal. It was the respondent's further submission that it only invited the claimant to show cause why disciplinary action should not be taken against him as a consequence of deserting work without leave, which did not take place as the claimant did not show up.

Analysis and determination

16. I have considered the pleadings on record, the evidentiary material before me and the rival submissions, and find that the issues falling for determination as being:-
- i. Whether there was a justifiable cause warranting termination of the claimant's employment.
 - ii. Whether the respondent complied with the requirements of a fair process prior to termination.
 - iii. Is the claimant entitled to the reliefs sought?

Justifiable cause to warrant termination?

17. It is not in dispute that the claimant was involved in a motorcycle accident on 4th August, 2014 and sustained injuries hence took time off to recuperate. What is in dispute is the claimant's absence from work beyond November, 2014 when he resumed work and was unable to continue with his normal duties.
18. The respondent contends that the claimant left the workplace and did not apply for leave nor seek an extended leave. On the other hand, the claimant avers that he was allowed to go home and report back to work when he felt better.
19. The claimant's assertion notwithstanding, he has not produced any evidence to confirm that he was formally allowed to be away from his workplace on account of his health condition. Indeed, there is no evidence from his end, to confirm that he applied for sick leave from November, 2014 when he resumed work and was not in a position to carry on his normal duties.
20. Pursuant to Section 30 (1) of the *Employment Act*, an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.



21. More importantly, subsection (2) of Section 30 provides that “For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.” Underlined for emphasis
22. What manifests from the foregoing provision is that the *Employment Act* has placed a burden on the employee to notify the employer of the reasons for his absence on account of ill health in order to be entitled to sick leave. Indeed, the notification is a precondition to an employee being granted sick leave. In this case, the claimant did not state whether he notified the respondent of his need for further sick leave and whether he applied for the said leave as required. As it is, there is no evidence to this effect.
23. Being the employee in this case and the one in need of the sick leave, it was the claimant’s duty at all times to keep the respondent posted as regards his medical condition and his readiness or otherwise, to resume duty.
24. I must say that it was lack of prudence on his part to assume that since the respondent was aware of his injuries, then it was not necessary to apply for sick leave or at least give a notification to that effect. In any case, sick leave is granted pursuant to a medical report and sick sheet duly signed by a certified medical practitioner. The claimant did not prove that he had done any of this, hence he acted imprudently in the circumstances. This lends credence to the respondent’s assertion that the claimant absconded duty from November, 2014.
25. It is worth pointing out that the requirement for notification under Section 30 (2) of the *Employment Act* is not just for purposes of formality. It is meant to inform an employer of the employee’s sickness and the projected period when he or she is likely to be away on account of illness. This is further noting that the *Employment Act* has provided for the duration an employee is entitled to be away on account of ill health. Therefore, it is evident that sick leave is not automatic and open ended. An employer needs to know for how long an employee is required to be away so as to plan its operations accordingly, for instance sourcing for a replacement during the said period the employee is away. In addition, the said notification is crucial for record purposes.
26. The respondent having failed to receive any formal notification from the claimant with regards to his inability to resume his normal duties, and moreso, a report from a certified medical practitioner to that effect, availed it the grounds and cause to take disciplinary action against him for desertion of duty.
27. For the above reasons, the respondent was justified to commence disciplinary action against the claimant for abscondment of duty, which notably, is a ground for dismissal under Section 44 (4) (a) of the *Employment Act*.
28. I now turn to consider the process applied by the respondent in dismissing the claimant from employment.

Fair Process

29. Procedural fairness is stipulated under Sections 45 (2)(c) and 41 of the *Employment Act*. In this regard, an employer is required to notify an employee of the reasons it is considering terminating his or her employment. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative. More importantly, it is worth mentioning that an employee has a right to be heard before being terminated from employment.
30. In the instant case, the claimant has contended that he was not subjected to a fair process as he avers that he only received a letter of dismissal through his postal address. To this end, he denies receiving the notice to show cause dated 3rd March, 2015, exhibited by the respondent.



31. On the other hand, the respondent contends that the claimant was invited to show cause why disciplinary action should not be taken against him for desertion. In this regard, the respondent avers that the claimant was invited to appear for a disciplinary hearing on 21st April, 2015 but failed to show up hence was dismissed.
32. The respondent has termed the termination letter exhibited by the claimant as fake and has argued that it could not have terminated him on the same day it sent the show cause letter. This assertion notwithstanding, the respondent did not exhibit the termination letter it issued the claimant. Further, the respondent did not lead any evidence to prove that it did not issue the letter of termination dated 3rd March, 2015 exhibited by the claimant. In the event it considered the said letter an act of forgery and seeing that it was on its letter head, then it was incumbent upon the respondent to prove that the letter did not emanate from its offices hence was not genuine. In any event, why didn't the respondent exhibit the letter of termination it issued the claimant? In absence of such evidence discounting the authenticity of the letter of termination exhibited by the claimant, I am enjoined to consider it as part of the record.
33. From the record, the claimant was terminated through the letter dated 3rd March, 2015. This is the same date as the show cause letter. In as much as the respondent has stated that the hearing of the claimant's disciplinary case was slated for 12th April, 2015, the same is inconsistent with the evidence on record as he was terminated on the same day of the show cause letter hence it is evident that there was no room for a hearing. This is coupled with the fact that the letter was sent by post hence there was no way the claimant would have received the letter and made arrangements to appear physically for the hearing.
34. Therefore, in as much as the respondent appeared to have commenced the process envisaged under Section 41 of the *Employment Act*, it did not fulfil the spirit of the said provision. The process contemplated under Section 41 of the Act is a process that is meant to ensure fairness prior to an employee's termination. It ought not be cosmetic. It should be genuine and aimed at hearing out an employee on the grounds for which the employer is considering termination of the employment.
35. As stated herein, the respondent had a justifiable reason to commence disciplinary action against the claimant for abscondment of duty. As such, it was duty bound to comply with all the legal requirements which entailed notifying the claimant of the reasons it was considering terminating his employment in a language he understands and in the presence of an employee of his choice or a union representative.
36. The bottom line is that the respondent ought to have granted the claimant a meaningful opportunity to defend himself and give his side of the story. It is at this juncture that the claimant would have availed his sick off sheet if at all he was in the possession of one and explained his absence from work.
37. In light of the foregoing, I cannot help but find that the respondent has not proved that it undertook the process contemplated under Section 41 of the *Employment Act* and if any was undertaken, then it was not within the spirit envisaged under said section. Therefore, the resultant termination was unlawful.
38. Having so found, what then are the reliefs available to the claimant?

Reliefs

One month's salary in lieu of notice

39. As I have found that the claimant was not terminated in line with fair procedure, I will award him one month's salary in lieu of notice.



Compensation for wrongful and unfair termination

40. As I have found that the respondent had valid grounds to terminate the claimant but failed to follow the stipulated procedure, I will award him three (3) months' gross salary in compensation as damages under this head.

Overtime

41. As to the claim for compensation for overtime, the same is declined for want of proof. In this regard, I will follow the determination in the case of *Rogoli Ole Manadiegi vs General Cargo Services Limited* [2016] eKLR where the Court had this to say in regards to the issue: -

“It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days....he did not justify the global figure claimed in overtime showing specifically how it was arrived at....”

42. I reiterate the determination in the above case and find that in absence of evidence to prove that the respondent worked overtime as alleged, the claim cannot be sustained.

Leave days

43. The claim for leave days is allowed as the respondent did not produce evidence in the form of leave records in line with its obligations under Section 74(1) (f) of the *Employment Act*. Such records would have helped ascertain the claimant's outstanding leave days.

House allowance

44. The claimant has sought to be paid house allowance for the period he served. The pay slips exhibited by the claimant indicate his salary as “gross”. The Black's law dictionary, 10th Edition defines gross income as the “Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings.”
45. A clear construction of the definition above, reveals that the term “gross” refers to all income payable. Presumably, these includes allowances an employee is entitled to. To buttress this finding, I draw support from the case of *Samson Omechi Ongera vs Tusker Mattresses Limited* [2018] eKLR, where the Court found that “Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime.”
46. I will arrive at a similar finding in this case and determine that the claimant's salary being “gross”, was inclusive of house allowance. As such, the claimant's prayer in that respect is denied.

Orders

47. Accordingly, I enter Judgment in favour of the claimant against the respondent and he is awarded: -
- One month's salary in lieu of notice, being the sum of Kshs14,000.00.
 - Compensatory damages equivalent to three (3) months of his gross salary being Kshs 42,000.00.



- c. Unpaid leave days being Kshs 11,200.00.
- d. The total award is Kshs 67,200.00.
- e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.
- f. The claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

STELLA RUTTO

JUDGE

Appearance :

For Claimant Mr. Muchiri

For the Respondent Mr. Njiru

Court assistant Abdimalik Hussein

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 had 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.

