



**Ndiege v ECS Limited (Cause 1604 of 2015)
[2023] KEELRC 1374 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1604 OF 2015**

J RIKA, J

MAY 31, 2023

BETWEEN

STEPHEN OKOTH NDIEGE CLAIMANT

AND

ECS LIMITED RESPONDENT

JUDGMENT

Court Assistant; Emmanuel Kiprono

Gakoi Maina & Company Advocates for the Claimant

Muthaura, Mugambi, Ayugi & Njonjo Advocates for the Respondent

1. The Claimant filed his Statement of Claim on 10th September 2015.
2. He states that, he was employed by the Respondent on or about 5th August 2013, as a Security Guard. He was placed on a 3-year contract, earning a monthly salary of Kshs. 12,000. He worked for about 2 years.
3. His leg was swollen between 24th June 2015 and 26th June 2015. He asked his Supervisor Kennedy Odindo for time off, to seek medical attention. He was still in pain on 26th June 2015. He nonetheless reported to work, but in great pain. On 28th June 2015 he asked for additional time off. He went to hospital on 29th June 2015. He reported for duty on 1st July 2015 still bearing plenty of pain. On 3rd July 2015, the pain was unbearable, and the Claimant did not report for duty.
4. He reported on 8th July 2015 with his treatment records. The Human Resource Officer was not in. He went back on 10th July 2015, and was asked to go back on 13th July 2015 and then on 14th July 2015. On the latter date, he was issued the Certificate of Service, indicating that his contract was terminated on 2nd July 2015. He states that termination was unfair under the Employment Act, 2007. He was not



issued a letter to show cause; there was no notice of termination; he was not taken through a disciplinary hearing; and was denied terminal dues.

5. He prays for: -
 - a. Declaration that termination was unfair.
 - b. 1-month salary in lieu of notice at Kshs. 12,000.
 - a. Annual leave over a period of 2 years at Kshs. 22,154.
 - b. Compensation for unfair termination at Kshs. 144,000.
 - c. Service at Kshs. 13,486.
 - d. Public holidays at Kshs. 17,538.
Total ... Kshs. 209,538.
 - e. Costs.
 - f. Interest.
6. The Respondent filed its Statement of Response and Counterclaim, on 6th November 2018. It concedes that the Claimant was its Employee.
7. He resigned with giving the Respondent the requisite notice. The Respondent did not terminate his contract. He failed to report for duty on 2nd July 2015. He did not communicate his reason for not reporting. He had 2 previous warnings. He failed to work for 7 days, without communication with the Respondent. The Respondent concluded that the Claimant was no longer interested in working. He absconded. He repudiated his contract. He is not entitled to any of the reliefs claimed.
8. The Respondent counterclaims the sum of Kshs. 8, 315, being notice due from the Claimant. It prays that, the Claim is dismissed, and the Counterclaim allowed, with costs to the Respondent.
9. The Court has not traced any Reply to the Counterclaim on the record.
10. The Claimant gave evidence on 17th June 2021 and on 4th November 2022, when he rested his case. Security Supervisor Kennedy Omondi, gave evidence for the Respondent on 17th February 2023, closing the hearing.
11. The Claimant adopted his Witness Statement and Documents on record, in his evidence. He was dismissed by the Respondent. He was told that he was late in reporting for duty. He was ailing. He was not issued a letter to show cause.
12. Cross-examined, he restated that his leg was swollen and painful. He called his Supervisor who allowed him sick-off days. He informed his Supervisor that his leg was worse, and he would not be able to return as scheduled, on 24th June 2015. He did not call his Supervisor on 25th June 2015. He reported on 26th June 2015, although in a lot of pain. He did not report on 27th June 2015. He did not inform his Supervisor about his absence on 27th June 2015. He was granted sick-off on 28th June 2015 by word of mouth. He did not report on 29th June 2015. He skipped duty on 30th June 2015, and reported on 1st July 2015. He skipped again, 2nd July 2015, and reported on 3rd June 2015. He followed the correct procedure on taking sick-off. He explained that he was mixed-up in his mind, because of his swollen and painful leg. He supplied the Human Resource Department his medical records. He did not exhibit the medical records in Court. He did not recall how many days, he was absent. Redirected, he stated



- that the Respondent was aware that he was unwell. He called his Supervisor and availed medical records to the Respondent.
13. Kennedy told the Court that he was the Claimant's Supervisor. The Claimant was away without the leave of the Respondent, for up to 9 days. He did not communicate with the Respondent. He had warnings.
 14. Cross-examined, Kennedy told the Court that there were various instances, when the Claimant was absent. He did not call Kennedy, during his absence leading to termination. Kennedy was not aware of communication made to the Human Resource Office. Kennedy went to the Claimant's house and sent the Human Resource Officer there; they did not find the Claimant. They found no one in his house. Kennedy was not aware of medical records supplied to the Human Resource Office, by the Respondent. If there were such records, they ought to have been supplied first to Kennedy, as the Claimant's Supervisor. He was a Guard for about 2 years. There was no disciplinary notice for the 9 days he was away. Redirected, Kennedy told the Court that the Claimant was supposed to report directly to him.
 15. In issue is whether the Claimant resigned or his contract was terminated by the Respondent unfairly or at all; whether he merits the remedies claimed; whether he owes the Respondent notice; and who should bear the costs of this Claim.

The court finds:

16. The Claimant was employed by the Respondent as a Security Guard.
17. He was issued a Certificate of Service by the Respondent, indicating that he was employed on 5th August 2013, and left employment on 2nd July 2015.
18. He worked for little under 2 years.
19. The Respondent alleges that the Claimant resigned, while the Claimant states that he was dismissed by the Respondent without reason, on or around 2nd July 2015.
20. There is no evidence that the Claimant resigned. The Respondent wrote to the Claimant a letter dated 14th July 2015, referenced "Resignation Without Notice."
21. The evidence on record shows that the Claimant was repeatedly absent from work on certain occasions, between 24th June 2015 and 2nd July 2015, when the Respondent issued the Certificate of Service to him.
22. He explained, without supplying medical evidence, that he was ailing during this period, his leg was swollen and paining, and that he sought medical attention from hospital.
23. At no time did the Claimant communicate a decision to resign, and the Respondent had no basis to conclude that the Claimant had resigned.
24. The Respondent could, without the supply of medical records by the Claimant, reasonably think that the Claimant had absconded.
25. But there was an obligation of the part of the Respondent, to charge the Claimant with the offence of absconding. It was wrong to just issue the Certificate of Service, on the assumption that the Claimant had resigned. The Respondent ought to have initiated disciplinary proceedings at the time it issued the Claimant the Certificate of Service, and establish the circumstances of the Claimant's persistent absence. He was available at the time the Certificate issued, and besides, his Supervisor was even familiar



with the Claimant's residence. There was no reason for the Respondent not to initiate disciplinary proceedings, if it was the view of the Respondent, that the Claimant was absent without leave of the Respondent, or other lawful cause.

26. The Respondent may have felt that the Claimant was wrong, in taking sick-off days, without following the correct procedure. He did not apply formally for sick-off, attributing this shortfall to mental mix-up, occasioned by the trauma from his swollen leg. There would be reason to justify termination, but the Respondent opted for another unconventional route, alleging that the Claimant had resigned.
27. The Court would agree with the Claimant that termination was instigated by the Respondent through the Certificate of Service, which pronounced the date of termination as 2nd July 2015. The Court is persuaded that the Claimant played a significant role, in creating the circumstances leading to termination of his contract. He was cavalier about obtaining sick-off days. Furthermore, he had accumulated 2 warnings, in a span of less than 2 years. The Respondent appears to have had enough of the Claimant's abysmal work attitude and lack of work ethics, and was desperate to see the Claimant's back. Unfortunately, the Respondent adopted a wrong approach, in achieving this objective. It is declared that termination was unfair.
28. He had worked for about 2 years. He was engaged in conduct which would amount to gross misconduct, warranting summary dismissal, and does not merit notice pay. He did not establish overtime worked and service gratuity. There are multiple leave application forms filled by the Claimant, exhibited by the Respondent. They do not establish that the was owed annual leave over a period of 2 years as claimed.
29. The Respondent, as concluded above, assumed that the Claimant had resigned, without reasonable ground. The Claimant may have engaged in the employment offence of absenting himself from the appointed place of work, without the leave of the Respondent, but there was no indication that he had resigned without notice. The Counterclaim has no foundation and is declined.
30. The Claimant worked for little under 2 years. He is awarded 1 ½ months' salary in compensation for unfair termination at Kshs. 18,000.
31. No order on the costs.
32. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

It is ordered:

- a. Termination was unfair.
- b. The Respondent shall pay to the Claimant equivalent of 1 ½ months' salary in compensation for unfair termination at Kshs. 18,000.
- c. No order on the costs.
- d. Interest allowed at court rate from the date of Judgment till payment is made in full.
- e. The Counterclaim is declined.

DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF MAY, 2023.

JAMES RIKA
JUDGE

