



**Ngoka v Motrex Limited (Cause 917 of 2016)
[2023] KEELRC 1255 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1255 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 917 OF 2016**

**M MBARŪ, J
MAY 18, 2023**

BETWEEN

KARISA MWAYULE NGOKA CLAIMANT

AND

MOTREX LIMITED RESPONDENT

JUDGMENT

1. This matter has had a long history. The claimant filed the Memorandum of Claim on 1st December, 2016; an Amended Claim on 20th January, 2017; and the response was filed on 26th January, 2017. The claimant was heard on his case on 4th February, 2019 and for one reason or the other, hearings were adjourned part of which was to allow for negotiations out of court but on 14th December, 2021 when the matter was scheduled for hearing the claimant and his advocate failed to attend and the suit was dismissed. In a ruling delivered on 13th May, 2022 the suit was reinstated and the respondent was heard on 19th April, 2023. The matter has therefore gone through the hands of different Judges hearing different components of the case and hence this background is found necessary.
2. The claim is that on 27th December 2014 the respondent employed the claimant as a driver at a wage of Ksh. 25,070 per month where he worked until 23rd June, 2015 and while driving the company motor vehicle Registration No.KAV 401R heading to Kampala Uganda, he was involved in a road traffic accident and hospitalised for two months. Thereafter the claimant continued to seek specialised treatment due to his fractured leg and hand.
3. The claim is also that the respondent continued to pay the claimant his wages for August and September 2015 but stopped the payments without notice leading to termination of employment while aware that the claimant was still unwell. This resulted in unfair termination of employment since there was no notice, disciplinary hearing or payment of terminal dues.



4. The claim is for judgment against the respondent on the grounds that there was unfair termination of employment and there should be an order of reinstatement and in the alternative payment of terminal dues.
5. The claimant testified that he worked well for the respondent as a driver and his last wage was Ksh. 28,000 but on 23rd June, 2015 while on duty driving Vehicle registration KAV 401R he had an accident at Samburu, Kwale and was admitted at Makadara hospital for two months where he used Ksh. 96,000 in medical bills. He left hospital in July, 2015 and the respondent continued paying his salaries until September, 2015.
6. The claimant testified that he reported back to work in 2017 and was told that he could not continue working as his truck had been extensively damaged. He was not paid workman's compensation despite submitting medical reports and his expenses.
7. Upon cross-examination, the claimant testified that he did not cause the accident but suffered injuries and remained unwell until the year 2017. Under his contract of service, there was a clause that stated that while away on sick leave he would be on half salary but he has remained sick to date and in constant need of medical attention.
8. In response, the respondent's case is comprised of mere denials and without any work records.
9. In evidence, the respondent called Ali Twalib the human resource manager who testified that his predecessor was Habiba Hassan who has since left the respondent and her whereabouts unknown. The claimant was employed in the year 2015 through a contract dated 29th January, 2015 as a driver earning Ksh. 22,071. He was involved in a road traffic accident while driving the respondent's vehicle KAV 401R as he headed to Kampala, Uganda. After the accident, the respondent continued paying the claimant his full wages but in September and October, 2015 he was paid half wage as set out under the terms and conditions of his employment contract. The payment of wages was stopped after the claimant failed to report back to work and until summons were served. There was no unfair termination of employment as alleged since the claimant failed to report back to work leaving the respondent with no option but to assume he had terminated his employment and the claims made should be dismissed with costs.
10. At the close of the hearing, both parties filed written submissions which are analysed and the issues which emerge for determination are whether there was unfair termination of employment and what remedies should issue if any.
11. The facts of the case are not contested to the extent that employment was from 27th December, 2014 to October, 2015 when payment of wages stopped after the claimant was involved in a road traffic accident on 23rd June, 2015 and was admitted in hospital for two months. Part of the terms and conditions of employment were that upon sickness, the respondent would pay full salary for such period for 30 days and 10 days half pay and for days absent without a genuine reason would not be paid for.
12. The claimant testified that upon being injured in the road accident on 23rd June, 2015 he was not able to return to work until the year 2017 but was told that the truck he was driving had been extensively damaged. The period of October, 2015 until an undefined date in the year 2017 is not accounted for.
13. An employee who is sick, unwell or unable to attend work due to illness is allowed under the provisions of Section 30 and 34 of the *Employment Act*, 2007 (the Act) to seek medical assistance and treatment and for such absence from work, upon return he must produce a Certificate of incapacity. Absence from work without good or justified reasons is gross misconduct subject to summary dismissal in terms



of Section 44(4)(a) of the Act. However, the employer too has a duty to issue the employee with notice to attend and explain why he has failed to resume duty and where the employee is unable to address and address such notice due to continued absence from work, the employer such as the respondent should serve the Labour Officer with notice pursuant to Section 18(5) (b) of the Act which requires that;

(5) Upon the termination of a contract of service—

(a) ...

(b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.

14. To therefore abandon employment, an employer should not sit back easy. Recourse must be to the law. The employer must invite the absent employee to show cause why employment should not be terminated and even where there is knowledge that the employee is unwell, once the period allowed for absence lapses, the employee misconduct of being absent from work must be addressed.

15. In the case of *Cooperative Bank of Kenya Limited v Yator* (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment), the court held that;

Even where an employee had committed gross acts of misconduct, which acts warranted summary dismissal, the law required that before such sanction was undertaken, an employer had to ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer was unable to hear the employee in defence, such had to only be in exceptional circumstances which the employer had to demonstrate.

... Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate.

16. Due process before employment can lawfully be terminated is imperative.

17. In this case, the claimant remained absent from work after he left hospital. The respondent continued to pay his salaries until October, 2015 and due to continued absence the payments were stopped. This was not sufficient. The respondent should and ought to have completed the process by application of Section 41(2) of the Act and where it was not practical to invite him for a hearing, apply the provisions of Section 18(5) as cited above.

18. Without taking the due process of the law, employment terminated unfairly.

19. The primary order sought by the claimant is reinstatement and in the alternative, payment of terminal dues. Reinstatement can only issue within 3 years after employment ceased. Even where such time was available, the circumstances leading to the exit of the claimant from his employment was an accident he caused and leading to extensive damage to the respondent's motor vehicle. To order reinstatement would not meet the ends of justice.

20. The alternative orders sought are for payment of terminal dues for notice pay and compensation.

21. The contract of employment provided for Ksh. 22,071 but the claimant testified that his last wage was Ksh. 28,000 but the written record is the contract of employment which give the exact wage due. For lack of due process, the claimant is entitled to notice pay at Ksh. 22,071.



22. With regard to compensation, in assessing the same, the court is required to look at the record of the employee in terms of Section 45(5)(b) with regard to the conduct and culpability of the employee up to the date of termination of employment as held in the case of *Allfayo Jagona Imbuya v Board of Management Ivugwi Secondary School* [2018] eKLR. The claimant remained absent from work due to sickness and left hospital within two months in July, 2015 but he never reported back to the employer until 2017. He did not submit a certificate of incapacity and none is filed in these proceedings. To award compensation would be to reward gross misconduct.
23. Accordingly, judgment is hereby entered for the claimant against the respondent with notice pay of Ksh. 22,071 only. Each party to pay own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

