



**Wekhomba v Board of Trustees, NSSF (Cause 678 of 2017)
[2023] KEELRC 1888 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1888 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 678 OF 2017
SC RUTTO, J
JULY 31, 2023**

BETWEEN

PATRICK WEKHOMBA CLAIMANT

AND

THE BOARD OF TRUSTEES, NSSF RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on April 10, 2017, the Claimant avers that on or about February 20, 2007, he was employed by the Respondent as a Clerical Assistant. He avers that he worked for the Respondent zealously up until 2012, when he was transferred to Naivasha as an office assistant. He continued to execute his duties with diligence and was awarded recognition and salary increments. The claimant avers that following his abduction by unknown people and subsequent transfer to Embu upon his request, the Respondent issued him with a notice asking him to show cause why disciplinary action should not be taken against him. Thereafter, he was summarily dismissed from employment on account of being absent from work for 9 days. According to the claimant, his dismissal was actuated by malice and clear breach of the Respondent's statutory duty. It is on account of the foregoing that he claims against the Respondent the sum of Kshs 16,933,307.93 being notice pay, unpaid salary from April, 2014, 10% salary increments and loss of future earnings. He further seeks reinstatement as well as a declaration that the Respondent's action of dismissing him from employment was unlawful and unfair.
2. The Respondent opposed the Claim through its Memorandum of Defence dated January 21, 2020 in which it denied every allegation and averment by the Claimant. The Respondent averred that the Claimant absconded work for 9 days and was issued with a show cause letter. It was further averred by the Respondent that the Claimant did not provide evidence to justify his absence from work hence he was summarily dismissed. The Respondent further maintains that it acted in accordance with the law in terminating the Claimant's employment as there were valid reasons for termination and that it



ensured due procedure was followed. Consequently, the Respondent has urged the court to find that the claimant's summary dismissal was lawful and to dismiss the suit with costs.

3. The matter proceeded for hearing on October 31, 2022 and on March 16, 2023, during which both sides called oral evidence.

Claimant's Case

4. The claimant testified in support of his case and to start with, he sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his Claim as exhibits before court.
5. It was the claimant's testimony that on November 25, 2013 while in Nakuru town, he was abducted by armed people who were not known to him. He remained in their captivity for 5 days during which period he was tortured by his captors who did not disclose why they were holding and torturing him.
6. On November 30, 2013 his captors released him after he promised not to report the incident to the police. They further threatened him that he was under watch and should he approach any police station, his life would end. After his release, he went to Valley Hospital where he was admitted until December 4, 2013 and thereafter given 7 days to recuperate from the injuries and trauma he suffered at the hands of his abductors.
7. The claimant further stated that he reported his abduction and subsequent treatment to his immediate boss, Madam Betty C. Chirchir, the Branch Manager. After sufficiently recovering, he went to work on January 13, 2014 and narrated his ordeal to Madam Chirchir, who advised him to report the incident to the police. When she realized that he was hesitant to report to the police for fear of the threat by his abductors, she assured him that after he reports, she would assist him get transferred out of Naivasha/ Nakuru area for his safety.
8. Subsequently, on January 14, 2014, he reported the incident at the Central Police Station Nakuru, where the matter had been reported under OB No.73/30/11/13 of November 30, 2013. With the advice, concurrence and encouragement of Madam Chirchir, he went to the respondent's headquarters on January 17, 2014 to seek a transfer out of Naivasha.
9. Between January 17, 2014 and January 28, 2014, he met the Respondent's Human Resource Manager, Carolyn Okul, Mr. Gichohi and Madam Murila, all senior officers of the Respondent directly in charge of staff matters. After he presented his case to these officers, they appreciated the magnitude of the danger he was in and after consultation with the Branch Manager, they decided to transfer him out of Naivasha.
10. It was his further testimony that on January 29, 2014, he received a phone call from his Branch Manager informing him that his transfer from Naivasha had been approved and that he needed to pick the letter from her office.
11. He travelled to Naivasha the same day, collected his letter and handed over all properties of the Respondent that he had in his possession and left for Embu. He reported to the respondent's Embu office on January 30, 2014.
12. While he was settling in his new work station, he was surprised when on February 13, 2014, the Branch Manager forwarded to him a letter from the Respondent's headquarters, through which he was asked to show cause why disciplinary action should not be taken against him for allegedly being absent, without permission for 14 days.



13. He wrote his response indicating that the days he was alleged to be absent, he was pursuing his transfer at the respondent's headquarters. He pleaded that disciplinary action should not be taken against him as he believed and still believe all the managers knew about his case. However, the respondent proceeded to summarily dismiss him on April 11, 2014.
14. He appealed the decision through the Trade Union but the Union was denied audience by the Respondent's management. On May 9, 2014, he made a direct appeal against his dismissal. That to date, the Respondent has never pronounced itself on the appeal save for the letter written by Madam Okul, which side stepped the issue of his appeal.

Respondent's case

15. On its part, the Respondent called oral evidence through Ms. Carolyn Okul who testified as RW1. She identified herself as the respondent's Human Resource Manager. Similarly, she adopted her witness statement to constitute her evidence in chief.
16. It was RW1's testimony that the Claimant absconded work for 9 days, that is 14th-16th January 2014 and 21st-28th January 2014. That she issued the Claimant with a show cause letter for absconding work. In his reply to the show cause, the Claimant admitted that indeed, he was away from work on the 9 days and did not provide any evidence in the form of approved leave application forms to justify his absence from work.
17. It was her further evidence that the claimant was invited to a disciplinary hearing which he attended in the company of a union representative where he was unable to defend the charges levelled against him. RW1 stated that she was present at this meeting. The claimant was summarily dismissed on April 11, 2014 for being absent from work without permission.
18. The claimant appealed his summary dismissal but the appeal was found wanting because it did not raise any valid grounds to warrant an appeal. She wrote the letter informing the claimant that his appeal was unmerited. This is contrary to the claimant's allegation that there has never been a response to his appeal letter.
19. The claimant's Union appealed against his summary dismissal and went ahead to report a trade dispute and the Conciliator upheld the claimant's summary dismissal.
20. It was RW1's evidence that the claimant was paid his terminal dues. She further stated that the suit is one day shy of being time barred under section 90 of the *Employment Act* and is an afterthought only filed for the sole purpose of unjust enrichment. In her view, the claimant has no valid cause of action.

Submissions

21. On his part, the claimant submitted that it is trite law that before the employer terminates an employee on the ground of absconding duty, the employer has a duty to get in touch with the employee and ask about this whereabouts. To support this argument, the claimant placed reliance on the case of *Boniface Francis Mwangi v BOM Iyego Secondary School* (2019) eKLR. It was the claimant's further submission that the actions of the respondent and its agents were not done in good faith and there was no justifiable reason to warrant his dismissal. In support of this position, the claimant invited the court to apply the determination in the case of *Milano Electronics Ltd v Dickson Nyasi Mubaso* (2021) eKLR.
22. The respondent on the other hand submitted that the claimant responded to the show cause letter and admitted that he was indeed away from work for 9 days. It was submitted that the claimant did not provide any evidence in the form of an approved leave application form to justify his absence. That



further, during the disciplinary hearing, the claimant was unable to defend the charges levelled against him.

23. The respondent further maintained that the claimant's discharge summary and the medical certificate/ "case continuation bed sheet" were an afterthought and had been fabricated. It was the respondent's further argument that the claimant did not provide credible evidence of the alleged abduction and treatment of any alleged injuries suffered as a result, until he had been summarily dismissed.
24. The Respondent further argued that it complied with the requirements of the law when terminating the Claimant's employment and that there were valid reasons for termination. In support of its arguments, the respondent placed reliance on the case of *Rodgers Titus Wasike v General East Africa Limited* (2020) eKLR.

Analysis and determination

25. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before court, together with the rival submissions and the following issues stand out for determination: -
 - i. Whether the respondent had a fair and valid reason to terminate the employment of the claimant;
 - ii. Was the claimant accorded procedural fairness prior to being terminated from employment?
 - iii. Is the claimant entitled to the reliefs sought?

Valid and fair reason?

26. The starting point in determining this question is section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further along the Act, section 45 (2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove: -
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. related to the employees conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...
27. In the case herein, the reason leading to the Claimant's termination was related to his alleged absenteeism from work. This can be discerned from his letter of summary dismissal which is partly couched: -

"Management considered your case carefully and the reasons advanced for your absence on the following days 14th-16th, 21st-28th January, 2014 making a total of nine (9) working days were found unacceptable. Consequently, a decision has been reached to summarily dismiss you from service of the Fund with immediate effect as per the provisions of the *Employment Act*, 2007 section 44 (4)(e)..."

28. The reasons for the claimant's dismissal flowed from his Notice to Show Cause dated February 10, 2014. Responding to the Notice to Show Cause, the Claimant stated that on January 14, 2014, he went to the Central Police Station where he wrote a statement. He further explained that he could not manage to get a vehicle to travel back to Nairobi on January 15, 2014, hence he travelled on 16th January, 2014. According to the claimant, he went to the Respondent's headquarters on January 17, 2014 and



- spoke to a Ms. Alice Musyoka who referred him to a Mr. Gathoni who was at the time held up in meetings. He only managed to see Mr. Gathoni on January 20, 2014. The claimant further explained that from 21st to January 29, 2014, he was at the Respondent's headquarters everyday until the day he was called by a Ms. Susan Murilla who informed him of his transfer to Embu.
29. Testifying under cross examination, the claimant stated that he was abducted on November 25, 2013 and that he did not report to work for nearly a month after that. It was his further admission during cross examination that he was required to be in Naivasha, his work station between 13th to January 29, 2014. Evidently, the claimant was not at his work station as he stated that he was in Nakuru reporting the abduction incident to the police and thereafter, was at the respondent's headquarters pursuing a transfer.
 30. In his further defense against the allegations of absenteeism, the Claimant added that while at Nakuru Central Police Station, he called his Branch Manager, Ms. Betty Chirchir to let her know of what was happening. He further stated during cross examination that his Branch Manager knew where he was during the days he is alleged to have been absent.
 31. It is common ground that the claimant was stationed at the Respondent's Naivasha Branch. Notably, his Notice to Show Cause was issued from the headquarters by RW1. Therefore, it is highly probable that it is the claimant's immediate boss at Naivasha (Branch Manager) who reported his absence from duty, as she was the one who was on the ground. One therefore wonders why the claimant's immediate boss would report his absence to the headquarters if at all she was aware of his whereabouts. This can only be interpreted to mean that she was unaware of the claimant's whereabouts or had not granted him permission to be away.
 32. Further, in the event she was aware that the claimant was pursuing a transfer at the headquarters, it would mean that he was doing so without authority to be away from office, since he would not have had to call her, as per his testimony, so as to notify her of his whereabouts.
 33. Indeed, it is apparent that the claimant acted quite imprudently if at all his version that he was pursuing a transfer at the respondent's headquarters is to be believed. I say so because, his absence from his work station in Naivasha is not supported by evidence of authority to be away. In the ordinary course of employment, it would be expected that for an employee to be away from work for such a considerable amount of time, such absence would be accompanied by the requisite authority in the form of duly approved leave or off.
 34. Therefore, the claimant's action of being away from his work station with no evidence of formal approval from his employer was by all means improper and amounted to absence from work without lawful authority. Indeed, one wonders why he did not apply for leave to allow him pursue the transfer from the Respondent's headquarters?
 35. Pursuant to section 44(4) (a) of the Act, absence from work without leave or lawful cause is one of the grounds for summary dismissal.
 36. Therefore, the mere fact that the Claimant was absent from work with no leave or lawful authority, availed the Respondent a fair and valid reason to take disciplinary action against him.

Procedural fairness?

37. The requirement of fair procedure is generally provided for under section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided for under section 41(1) of the Act. In this case, an employer is required to notify an employee of the intended termination in a language he



or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her.

38. In the instant case, the process was commenced through the Notice to Show Cause dated 10th February, 2018. The Claimant responded to the Notice to Show Cause and thereafter, he appeared for a disciplinary hearing.

39. In Considering the import of section 41 of the Act, the Court of Appeal had this to say in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR:

“Four elements must thus be discernible for the procedure to pass muster:-

- (i) an explanation of the grounds of termination in a language understood by the employee;
- (ii) the reason for which the employer is considering termination;
- (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

40. Applying the above decision to the instant case, I am satisfied that the Respondent complied with the requirements of section 41 of the *Employment Act*. Suffice to say, it fulfilled the spirit of Section 41.

41. In the circumstances, I find that the claimant was accorded procedural fairness as he was informed of the allegations levelled against him and given an opportunity to be heard on his explanation to the allegations. To this extent, the Respondent cannot be faulted.

42. In the end, the court finds that the claimant’s termination was neither unfair nor unlawful.

Reliefs?

43. As the court has found that the claimant’s termination was not unfair and unlawful, the reliefs sought in the Memorandum of Claim cannot be sustained save for the issuance of a Certificate of Service in accordance with section 51(1) of the *Employment Act*. This shall issue within 30 days from the date of this Judgment.

Orders

44. In the final analysis, I dismiss the Claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Walubengo for the Claimant

Mr. Masese for the Respondent

Abdimalik Hussein Court Assistant

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.

STELLA RUTTO

JUDGE

