



**Warutumo v Chemigas Limited (Cause 1551 of 2018)
[2023] KEELRC 3080 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3080 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1551 OF 2018
J RIKA, J
NOVEMBER 30, 2023**

BETWEEN

JAMES MAINA WARUTUMO CLAIMANT

AND

CHEMIGAS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim, on 23rd November 2018.
2. He states that he was employed by the Respondent, as a Driver, in June 2006.
3. He took his annual leave of 10 days, sometime in early February 2018. While on leave, he was taken ill, and could not return to work on time. He called his Manager, and informed him of his predicament. His Manager agreed to extend the Claimant's leave by several days.
4. On 23rd February 2018, he received a call from the Respondent directing him to go to the Respondent's Office, and pick his letter. He reported there the following day, and was served a letter of summary dismissal. It was alleged that he had deserted duty. He was immediately ordered out of the premises, by the Manager.
5. His last salary was Kshs. 81,654 monthly.
6. He states that termination was without valid and fair reason. He was not heard, or issued a letter to show cause why he should not face disciplinary action. He was not issued notice of termination, and Certificate of Service was withheld by the Respondent.
7. He prays for: -
 - a. Declaration that termination was unfair.
 - b. 1- month salary in lieu of notice at Kshs. 81,654.



- c. Annual leave, at 21 days annually for 11 years, at Kshs. 725,471,
 - d. Service pay at Kshs. 518,194.
 - e. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 979,857
Total...Kshs. 2,305,178.
 - f. Certificate of Service.
 - g. Interest.
 - h. Costs.
8. The Respondent filed its Statement of Response on 24th January 2019. It is conceded that the Claimant was employed by the Respondent as pleaded. He went on annual leave in February 2018. He was to resume on 13th February 2018. He did not resume for reasons known only to himself. The Respondent placed several calls to him to no avail. He did not inform his Manager about his absence as alleged. The Respondent decided to issue him with the letter of summary dismissal.
 9. After dismissal, the Claimant wrote a resignation letter dated 21st February 2018. It was then, that the Respondent realized the Claimant was not coming back. The Respondent concluded that the Claimant had resigned before dismissal, and was not coming back. Termination was at the instigation of the Claimant. He did not report to the Respondent's office after resignation as alleged. His prayers have no foundation. He was registered with the N.S.S.F and not entitled to service pay. He was paid terminal dues. The Respondent prays for dismissal of the Claim, with costs.
 10. The Claimant and the Respondent's Manager Yusuf Khan, both gave evidence for the respective Parties on 30th June 2023, closing the hearing. The Cause was last mentioned before the Court on 19th September 2023, when the Parties confirmed filing and exchange of their Closing Submissions.
 11. The Claimant adopted his Witness Statement and Documents [exhibit 1-5] in his evidence-in-chief. He restated his employment history and his terms and conditions of employment with the Respondent. He did not have a written contract. N.S.S.F contributions were deducted from his salary and remitted. His disciplinary record was clean. He never went on annual leave, except on the last days of February 2018. He suffered bronchitis, as shown in the medical report. He would call his Manager on phone, for off-duty authorisation. He called the Manager after he fell ill while on leave, who authorized extended leave. He was called to the office and handed a letter of summary dismissal, alleging he had deserted. He was not heard. He did not resign as alleged by the Respondent. He did not write a letter of resignation. He was told to leave the premises by the Respondent. He was not paid terminal benefits. He did not secure alternative employment.
 12. Cross-examined, the Claimant told the Court that he never went on annual leave for 11 years, save on the last occasion. He took 10 days in February 2018. He did not apply for leave in the previous years. He got married in 2013. He did not take leave even during his wedding. He claims service pay. He was subscribed to the N.S.S.F. He was taken ill on 14th-15th February 2018. His leave was ending on 21st February 2018. He called his Manager Khan. He did not recall when exactly he called Khan. He did not have a record of the call. The medical report is from Kasuku Hospital. It is not written on a letterhead. It is signed by a Doctor. It is stamped. It does not state the number of sick-off days granted. He took the medical report to the Respondent on 24th February 2018. The Claimant had been driving Trucks. He was assigned a smaller lorry. He could not resume long distance-driving because of the windy conditions, which adversely affected his health. He once had an accident. His disciplinary



- record was otherwise clean. He did not write the letter of resignation. He does not know how to write. He could not resign, because he was earning a good salary.
13. Redirected, he clarified that he went home to Ol joro orok for annual leave, about 200kms from his normal place of work at Nairobi. He fell ill at home. He was not given a chance to explain his absence. The nature of his work did not allow him to go on annual leave over 11 years. The Manager normally authorized sick-off by word of mouth. The letter of resignation is in English. The Claimant does not understand this language. The letter does not have his signature. He was called for the letter of summary dismissal dated 21st February 2018, on 23rd February 2018. He could not have resigned, on 21st February 2018.
 14. Manager Yusuf Khan, told the Court that he has worked for the Respondent for 16 years. He knows the Claimant. Khan relied on his Witness Statement and Document [1] filed by the Respondent, in his evidence-in-chief. He confirmed the employment details of the Claimant, as pleaded by the Parties.
 15. The Claimant went on leave around 3rd February 2018. He was to return on 13th February 2018. He did not. His phone was switched off. The Respondent could not reach him. The Respondent wrote a letter of termination, which was left at the Respondent's gate, for collection by the Claimant. He collected the letter. He gave the Respondent a letter of resignation, when he collected the letter of termination. He did not supply the Respondent any medical report. Leave would normally be applied for in writing, 7 days before it is taken. The Respondent would check if there was a leave balance, and authorize if affirmative. Sick leave would be supported by medical report. The Claimant applied for 10 days of annual leave, not sick leave. He was a senior Driver. He worked well. He signed the resignation letter. He did not have outstanding leave days. He is not owed any terminal benefits. Annual leave was to be utilized within 2 years.
 16. Cross-examined, Khan confirmed that the Claimant was employed by the Respondent as a Driver, on a monthly salary of Kshs. 81,654. Khan made several calls to the Claimant during the Claimant's absence, which did not go through. Dismissal was on 24th February 2018. The Respondent had not received the Claimant's resignation letter. There were rules regulating leave. The period could not be extended verbally. The rules were not exhibited before the Court. The Respondent did not write any other letter, enquiring about the Claimant's whereabouts. The Respondent has not filed any counterclaim. The Respondent did not receive any medical report from the Claimant. It wrote to the Claimant a letter of desertion. The letter predated the letter of resignation. It was not withdrawn upon receipt of the resignation letter. Khan confirmed that the Claimant was not heard. He was not issued a letter to show cause. It was logical to travel from Ol joro orok to Nairobi, to collect a letter of dismissal. The medical report was mentioned in the letter of resignation. The Respondent did not enquire where a copy of the medical report was. The Respondent has not exhibited formal leave application forms.
 17. Redirected, Khan told the Court that desertion letter came first. Resignation letter came after. There was no withdrawal of the letter of desertion. It was already in effect. The Respondent did not enquire about his medical report because the Claimant was out of touch. The Respondent expected him to report to the office for discussions.
 18. The issues are whether termination was executed fairly; whether it was based on valid reason[s]; whether the Claimant resigned; and whether he merits the prayers sought.

The Court Finds: -

19. It is common ground that the Claimant was employed by the Respondent as a Driver, in June 2006. The Respondent wrote to the Claimant on 24th February 2018, alleging that he had deserted duty, and



refused to answer the Respondent's calls, leaving the Respondent with no option, but to summarily dismiss him.

20. The Respondent states that after issuing the letter of summary dismissal, it received a letter of resignation from the Claimant dated 21st February 2018, and it was then that it realized that the Claimant did not intend to return to work.

Procedural fairness and resignation.

21. To resolve the issue whether procedure was fair, it is necessary to first resolve whether the Claimant initiated termination through resignation, or whether the Respondent initiated termination, through the letter of summary dismissal.
22. The Claimant disputes that he wrote the letter of resignation, dated 21st February 2018. He would not resign, chiefly because he was earning a handsome salary of Kshs. 81, 654 monthly. He did not understand English language, the mode of communication used in the letter of resignation.
23. The Court does not think that the Claimant issued, or wrote the letter of resignation. He had applied to go on 10 days of annual leave. He did not have reason to write during that period, when he fell sick, taking the drastic decision to call it quits.
24. The letter of resignation exhibited by the Respondent is of questionable authenticity. It refers to attached medical report, while the Respondent's position is that it never received any medical report from the Claimant. It predates the letter of summary dismissal, which is referenced 'desertion.' The Respondent states at paragraph 7 of the Statement of Response, that it issued the letter of summary dismissal first, then received the letter of resignation, confirming that the Claimant was not coming back.
25. If the letter of summary dismissal issued first, before the Respondent had wind of resignation, it can only mean that the Respondent initiated termination. The letter of resignation, even if genuinely authored by the Claimant, would be immaterial, coming after the Respondent had severed the employment contract, through summary dismissal. The Court is satisfied that termination was at the initiation of the Respondent, through the letter of summary dismissal, and not through the purported letter of resignation, issued by the Claimant.
26. The procedure in executing summary dismissal was fundamentally flawed. Yusuf Khan told the Court on cross-examination that: -We did not withdraw the letter of desertion on receiving the letter of resignation. We did not get in touch with the Claimant to hear him. We did not issue notice to show cause. We did not enquire where the medical report referenced in the letter of resignation was. We gave the letter of desertion. There was no other letter. We did not enquire about his whereabouts. No rules of procedures on sick leave application, were exhibited by the Respondent.
27. The totality of the above evidential concessions, is that termination was procedurally unfair, and did not meet the minimum statutory standards of fairness, contemplated under Sections 41 and 45 of the [Employment Act](#) 2007.

Validity of reason[s]

28. The Respondent advanced 2 reasons justifying termination- resignation and desertion. Resignation was not a valid reason as concluded above, in discussing procedure. The Claimant left for 10 days of annual leave, on 3rd February 2018. He was to return on 13th February 2018. He did not.



29. His explanation was that he fell ill while on leave, and contacted Manager Khan for a few days' leave extension, to enable him recuperate. It was while on extended leave, that he received communication from the Respondent, instructing him to report to the Respondent's office at Nairobi, to pick his letter. He did so, and was issued the letter of summary dismissal, referenced 'desertion.'
30. The Claimant has exhibited a medical report issued by some local Doctor at his Ol joro orok village, dated 16th February 2018. It certified that the Claimant was being attended to by the Doctor, from 10th February 2018, for allergic bronchitis. He had been advised by the Doctor to continue with medication on 16th February 2018, and avoid dusty, smoky and stressful working conditions.
31. The Respondent acknowledged reference was made to a medical report, in the disputed letter of resignation. While there is no conclusive proof that the medical report the Respondent was aware of, is the same medical report from Ol joro orok, there is adequate evidence that the Respondent was aware the Claimant suffered a medical condition. The Claimant told the Court, without challenge from the Respondent, that he had been assigned a smaller lorry, and removed from driving in windy conditions, on account of his bronchitis.
32. It is probable that the Claimant was ill while on leave at Ol joro orok.
33. The Court does not think however, that the nature of his illness, was such as to keep him away from his workstation at Nairobi. The medical report he relies on, did not advise that he keeps away from his workstation. He was not placed on bed rest. He was told to continue taking medicine, and avoid dust and smoke. He had already been reasonably accommodated by the Respondent on account of his bronchitis, by being taken off the windy conditions, and assigned a smaller lorry. He suffered bouts of allergic bronchitis, which was not debilitating to confine him to his bed at Ol joro orok. Allergic bronchitis was not a medical condition, that suddenly appeared at Ol joro orok. There is no reason in the view of the Court, why he chose to overstay at Ol joro orok. He could have gone back to Nairobi when his leave ended, and continued with his medication there, with the full communication to, and concurrence of his Employer.
34. There is no evidence by the Claimant that his extended stay away from work was authorized by the Respondent. There is no evidence that he called Khan, and was allowed to stay away. Even when he alleges to have called Khan, the Claimant did not specify how many days of extended leave he was allowed. Most probably none was allowed.
35. The Court is persuaded that the Claimant was absent from his appointed place of work, without the leave of the Respondent, and without other lawful cause. He was engaged in an act of gross misconduct, under Section 44[4] [a] of the *Employment Act*. Termination was based on valid ground.

Remedies.

36. It is declared that termination was not fairly executed, and was therefore unfair.
37. Termination was based on desertion, a valid reason which would warrant summary dismissal under Section 44[4] [a] of the *Employment Act*. Summary dismissal means termination without notice, or with less notice than given under contract or statute. The Claimant is not entitled to notice pay, having been dismissed for an act of gross misconduct.
38. The Claimant states that he did not take annual leave for 11 years, save for the 10 days he took leading to termination. The Respondent's Witness told the Court that the Claimant did not have any outstanding leave days, and that annual leave was to be utilized within 2 years.



39. The problem with the explanation by the Respondent is that it was not anchored on any employment records. The Respondent did not issue the Claimant a written contract. It religiously espoused an oral employment tradition, except when issuing the letter of summary dismissal. It did not exhibit before the Court employment records, to support its position on leave. Section 74 [1] [f] of the [Employment Act](#), requires an Employer to keep a written record of an Employee's annual leave entitlement, days taken and days due, as specified in Section 28 of the Act.
 40. Without exhibition of such annual leave records, the Court can only uphold the oral evidence of the Employee. Section 10 [7] of the [Employment Act](#) states that, if in any legal proceedings an Employer fails to produce a written contract, or the written particulars prescribed in subsection [1], the burden of proving, or disproving an alleged term of contract stipulated in the contract shall be on the Employer. The Claimant alleges that he was entitled to 21 days of annual leave. No written contract or particulars were exhibited by the Respondent disproving this evidence. No contract was exhibited showing that the Claimant would forfeit his annual leave, if not utilized within 2 years. No provision under the [Employment Act](#) was cited by the Respondent, supporting such forfeiture. There were no annual leave forms, exhibited by the Respondent, showing that the Claimant utilized his annual leave. No pay slip was exhibited, showing payment of leave.
 41. He is allowed the prayer for annual leave. He worked for a period of 11.5 years. This would amount to 21 days x 11.5 years = 241.5 days of annual leave. He utilized 23 days leading to termination. He merits annual leave pay based on 241.5 days – 23 days = 218.5 days.
 42. He is granted annual leave pay at [Kshs. 81, 654 divide by 26 working days x 218.5 days] = Kshs. 686,207.
 43. He was subscribed to the N.S.S.F and his pay slips show contributions were consistently remitted by the Respondent, upon deduction from his salary. He is not entitled to service pay under Section 35[6] of the [Employment Act](#).
 44. Termination was based on valid reason, but flawed on procedure. The Claimant contributed to, or substantially caused, the circumstances leading to termination. If he had travelled back to Nairobi, as scheduled, and continued his treatment for bronchitis while at work, or upon the formal leave of the Respondent, the Court does not think termination would have taken place. He was ill, but the Respondent had retained him, reasonably accommodated him, until he extended his leave, giving the Respondent the perfect opportunity to dismiss him. He served for 11.5 years. The Court has not seen evidence of terminal benefits paid to the Claimant. He did not secure alternative employment. He did not disclose to the Court how long he expected to go on working, had his contract not been terminated by the Respondent.
 45. He is awarded equivalent of 4 ½ months' gross salary in compensation for unfair termination, at Kshs. 367,443.
 46. Certificate of Service to issue.
 47. No order on the costs.
 48. Interest granted at court rate, from the date of Judgment, till payment is made in full.
- In sum, it is ordered: -
- a. It is declared that termination was unfair on account of procedure.
 - b. The Respondent shall pay to the Claimant, annual leave pay at Kshs. 686,207 and compensation for unfair termination at Kshs. 367,443 – total Kshs. 1,053,650.



- c. Certificate of Service to issue.
- d. No order on the costs.
- e. Interest granted at court rate, from the date of Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI,
UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT
PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF NOVEMBER 2023.**

JAMES RIKA

JUDGE

