



**Ruthuku v Kenya Revenue Authority (Cause E003 of 2023)
[2023] KEELRC 2834 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2834 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E003 OF 2023
M MBARÚ, J
NOVEMBER 9, 2023**

BETWEEN

RAPHAEL KIHARA RUTHUKU CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. The claimant was an employee of the respondent in the ICT department where he worked until 9 January 2020 earning a salary of Kshs. 157,000 per month.
2. Through letter dated 9 May 2019 the respondent transferred the claimant among other employees. The claimant lodged an appeal on 27 May 2023 on the grounds that he suffers respiratory condition and was being treated at Mombasa Hospital and advised to live in humid weather conditions and avoid a cold environment which would trigger headaches. Despite his appeal, through letter dated 16 August 2019 the respondent instructed the claimant to report to KESRA Nairobi and failure to do so would lead to disciplinary action.
3. Following this response, the claimant filed ELRC Cause No.56 of 2019 seeking for an order of injunction restraining the respondent from transferring him from Mombasa to Nairobi but 2013 December 2019 the court declined to issue the orders sought.
4. On 17 December 2019 the respondent issued the claimant with notice of insubordination and failure to comply with transfer instructions. He was directed to give written representations within 7 days or this would be construed as gross misconduct subject to summary dismissal. Through letter dated 23 December 2019 the claimant responded but upon reporting to work on 13 January 2010 he learnt that his employment had been terminated on 9 January 2020.
5. The claim is that the claimant had sent a message through email on 8 January 2020 to the human resource on his inability to attend disciplinary hearing due to sickness and requested for a reschedule



or a transfer to Kajiado. Instead, through notice of summary dismissal. Despite his appeal, through notice dated 10 March 2020 the respondent rejected it.

6. The claim is that the only reasons the respondent failed to consider his appeal or transfer to Kajiado was because the matter had been dispensed of through the court and hence treated the matter as closed. The matter filed in ELRC No.56 of 2019 was not heard on the merits. It was dispensed at the preliminary stages. The main reasons the respondent took action against the claimant was due to his filing ELRC Cause No.56 of 2019 which is unlawful and unfair.

The claimant is seeking the following;

- a. Unpaid salary from 22 December 2019 to 9 January 2020 Kshs. 99,433;
 - b. 20 pending leave days Kshs. 104,667;
 - c. Compensation for unlawful termination Kshs. 1,884,000;
 - d. Damages for premature termination of employment of 14 years;
 - e. Damages for discrimination on medical grounds; and
 - f. Costs.
7. The claimant testified in support of his case and reiterated his claim and that he was deployed in Mombasa in the year 2009 and the respondent has a policy to transfer staff after every 4 years. he had stayed in Mombasa for over 10 years. The respondent initially transferred him to Nairobi through letter dated 16 August 2019 and he lodged an appeal and filed ELRC Misc. 56 of 2019 but this was not allowed and he was transferred to Kajiado. He appealed but instead he was issued with a notice to show cause. He responded and sent it through email. He was invited for disciplinary hearing but did not attend after requesting for a re-schedule through email on 9 January 2020. In the email, he indicated he was unwell but did not attach anything but indicated he would be unable to attend and was feeling unwell. There was no sick sheet attached. He indicated that on 11 December 2029 he was unwell which was an error but was not able to correct.
 8. The claimant testified that he is aware of the respondent's policy that when sick, one must submit the sick sheet within 24 hours and when he reported to work on 13 January 2020 he learnt that he had been dismissed on 10 January 2020. He lodged an appeal but this was rejected.
 9. In response, the respondent's case is that the claimant was employed in ICT department on 29 August 2005 and then appointed Assistant Support Analyst on 20 April 2006 and then confirmed through letter dated 26 October 2006.
 10. The claimant was transferred through letter dated 9 May 20119 to work at Kenya School of Revenue Allocation (KESRA) at Mombasa as supervisor-ICT. The transfer was pursuant to policy and need to move from Mombasa to KESRA Nairobi. He appealed against the transfer on the basis that he had respiratory condition but without any medical report.
 11. The transfer policy of the respondent required the claimant to give documentation of his illness or that his condition could not be managed by doctors in Nairobi but he declined to give any report.
 12. Through letter dated 12 September 2019 the respondent reviewed the claimant's appeal and transferred him to Nairobi regional station, Kajiado which is not considered cold and would suit his medical condition but he declined to report and opted to file ELRC Cause No.56 of 2019 seeking injunctive orders stopping his transfer and the court declined to issue the same through a ruling delivered on 13 December 2019.



13. Through notice dated 17 December 2019 the respondent invited the claimant to show cause why disciplinary action would not be taken against him for failure to take directions and to report at his work station. The claimant was then invited for a hearing but he remained absent from work on 21 December 2019 and the alleged leave taken was without approval.
14. On 23 December 2019 the claimant was issued with a show cause notice and invited to attend hearing on 9 January 2020 but he failed to attend. The claim that he sent an email seeking for a reschedule on 9 January 2020 and not on 8 January 2020 as pleaded. His email stated that he was feeling unwell and had been put to bed rest until 11th December 2019. There was no sick sheet attached as required in the policy.
15. The notice of summary dismissal was procedural and lawful. The appeal lodged was without merit and hence dismissed on 6 February 2020 and the claims made are without merit and should be dismissed with costs.
16. The claim for unpaid salaries is not justified since the claimant was paid for days worked until 20 December 2019 and 3 months' notice pay as noted in the letter terminating his employment.
There were no pending leave days.
17. Compensation is not payable in a case where summary dismissal was justified and the claim for damages for premature termination of employment is not justified.
18. In evidence, the respondent called Jackson Kimeu Kyalo the assistant manager, human resource division who testified that prior to the transfer of the claimant through letter dated 9 May 2019 he was at KESRA Mombasa and he was moved to Nairobi with other employees as per the policy guidelines to develop staff and provide basis for succession planning. The Transfer Policy at clause 6.0 the respondent is allowed to transfer employees to address staffing needs. The claimant's allegation that he was allergic to cold was not backed by any medical report and when he was transferred to Kajjido, he did not comply. His matter was reviewed administratively and taking into account that the police required one to be at a given station for 4 years and he had served for over 10 years, it would be found necessary to transfer him but he declined to take such directions.
19. The claimant was invited to show cause with regard to his refusal to take directions contrary to the policy and Section 44 of the *Employment Act*. He failed to attend or to give reasons for such lapse. The allegations that the dismissal was because he had filed ELRC Cause No.56 of 2019 is not correct since the court delivered a ruling on 13 December 2019 and dismissed the application. The claimant failed to give any reason why he declined to report to Kajjido to enable the respondent give consideration and cannot claim that he was targeted for discrimination due to sickness.
20. 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 discrimination against the claimant; whether there was unfair termination of employment and whether the remedies sought should issue.
21. Through letter dated 9 January 2020, the respondent terminated the claimant in his employment after being invited to attend disciplinary hearing through letter dated 3 January 2020 to attend on 9 January 2020 but he failed to attend.
22. The invitation to attend on 9 January 2020 was with regard to various communications issued to the claimant on his transfer from KESRA Mombasa to Nairobi region – Kajjido station which the claimant sought to be reviewed on the basis that he was allergic to cold and had been advised by his doctors to keep in humid weather conditions to avoid a trigger to his respiratory problems.



23. Indeed, under the law, an employee who is unwell and required medical attention is allowed to take time off and get treatment in terms of Section 30 and 34 of the *Employment Act*, 2007 (the Act). However, the employee seeking medical attention is required to notify the employer. The law is generous to the extent that a third party is allowed to inform the employer on behalf of the employee, in the event the subject employee is unable to communicate such matter as held in *Dorothy Njoki Ndung'u v Machakos University College & another* [2017] eKLR.
24. Hence, once the claimant was invited to attend before the disciplinary panel on 9 January 2020, it was his duty to communicate his inability to attend and defend himself. Failure to attend upon invitation led to the claimant frustrating his own employment.
25. On the morning of 9 January 2020, the claimant sent his notice and inability to attend. He noted that I'm aware that I'm supposed to appear before the disciplinary committee today, but unfortunately I have been feeling unwell since yesterday and upon visiting hospital I was put on bed rest until 11th December 2019 I am kindly requesting for a reschedule.
26. In evidence, the claimant noted that the date of 11 December 2019 was an error.
27. However, he did not follow up the matter to clarify the error and point out the mistake and state the correct dates.
28. The sick off sheet required from a medical practitioner was not attached to the email of 9 January 2020. This was only availed to the respondent on 6 February 2020 when the claimant lodged his appeal, by which time, his employment had terminated for his failure to attend and defend himself on 9 January 2020.
29. The claimant cannot blame the respondent for the action taken. Failure to attend as directed by the employer is a matter well addressed under Section 44(3) and (4) of the Act. The employee is subject to directions and instructions by the employer. Failure to abide lawful directions to attend, such is a serious breach of the employment contract and justify the sanction of summary dismissal.
30. The Court of Appeal in the case of *Paul Wanyagah v Market Development Trust t/a Kenya Markers Trust Civil Appeal No. 356 of 2017* held that an employee who is invited to attend any matter at the workplace and refuses to oblige commits gross misconduct and is insubordinate. Refusal to attend as directed by the employer is tantamount to abdication of duty unless the employee can demonstrate that the summon was unlawful or related to illegal activities which is not the case here.
31. The court in the case of *Jennifer Osodo v Teachers Service Commission* [2013] eKLR held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.
32. Equally in this case, the claimant frustrated his own employment. He cannot justify his conduct. Employment terminated upon the due process and lawfully.
33. On the claim that there was discriminatory treatment on the basis of medical condition, the claimant appealed upon his transfer from KESRA Mombasa to Nairobi and noted that he had a respiratory



condition without attaching any record. This was addressed and reviewed for him to report to Kajiado office. He failed to oblige. The only medical record filed is the sick sheet dated 8 January 2020 from Jocham Hospital which was attached to his letter of appeal on 6 February 2020.

34. Even with the best effort to make his case, the claimant sat on his rights for too long. He cannot justify his case that there was discriminatory treatment on the basis of his medical condition while on his part, he held to his medical reports and only submitted a sick off sheet long after termination of employment. A prudent employee, aware of the transfer policy that required one to be at a given station for 4 years and to move on ought and should have made his case with tangible records to allow for a proper review of his case.
35. An employer cannot be held ransom by an employee by asserting that he can only work in one particular station. Indeed, Mr Kyalo testified to the fact that for any employer to grow and be able to address succession planning, transfer of employees is necessary, legitimate and lawful. It is a management prerogative and a chance to accommodate a given employee must be based on good cause which the claimant failed to address and cannot turn around and assert that he was discriminated against on the grounds of his health status.
36. In the case of *Moses Kirui Toroitich v County Secretary, County Government of Baringo & 2 others* [2021] eKLR the transfer or deployment of staff is a management prerogative and this Court will on very rarely and exceptional circumstances interfere. This is aptly captured in the case of *Henry Ochido v NGO Co-ordination Board* [2015] eKLR that;

The employer is bestowed with prerogatives at the work place to ensure that employees perform their duties as allocated; to give directions and create policies to ensure work performance and where there is misconduct, gross misconduct, such an employer has the latitude upon notice to summarily dismiss an employee found with such misconduct. The prerogative to ensure that work is done to the satisfaction of an employer therefore entails the employer having the mandate to allocate work without inhibitions and to do so in an environment that facilitates the employee to work in a conducive environment.

... a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station. To otherwise contest work allocation in a set work station on the basis that the Respondent has not properly allocated such a station is to challenge that prerogative of the employer.

37. The matter of alleged discriminatory treatment is lost. It has no foundation. The reliance on ELRC Cause 56 of 2019 as the reason leading to termination of employment lacks merit as the court address the claimant's application on the merits and no appeal is made or pending. Had such been the case, the claimant ought to have attended upon invitation to defend himself and addressed his concerns.
38. On the claim for pay for days worked, the claimant's case is that he is owed Kshs. 99,433 for salaries due from 22 December 2019 to 9 January 2020. He reported to his work station in Mombasa where he learnt that his employment had been terminated. Through letter dated May 2019 the claimant was transferred from Mombasa office. He appealed and through letter dated 8 October 2019 his manager at Mombasa advised him to hand over his duties and proceed on transfer. Following the court ruling in



ELRC Cause 56 of 2019 on 13 December 2019 the claimant was aware that he was required to report as directed to Kajiado station. He did not oblige and notice dated 17 December 2019 issued.

39. For days out of his allocated station, the claimant cannot seek payment. Deduction of wages for days out of the work station is allowed in terms of Section 17 and 19 of the Act.
40. On the claim for 20 pending leave days, the employer is the custodian of work records. Upon the claimant's claim, the respondent ought to have filed his work records with regard to leave days taken and the pending leave days and indicate if nil days applied. The response that this claim required strict proof is to avoid the motions of Section 10(6) and (7) of the Act which requires the employer to produce work records once a claim is filed.
41. The claim for 20 pending leave days is found justified all at Kshs. 104,667.
42. On the claims for payment of damages for premature termination of employment for 14 years, having frustrated his own employment, such a claim is not justified. The rationale is that, at the end of employment, the employee is required to mitigate his circumstances by securing new employment.
43. In addressing a similar matter, the court in *Engineer Francis N. Gachuri v Energy Regulatory Commission Cause No. 203 of 2011* held that;

There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the *Employment Act* does not mention the word 'permanent employment

44. Accordingly, the claims made are found without merit save for 20 leave days awarded at Kshs. 104,667. The claim largely without merit, the respondent is awarded 50% costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

