



REPUBLIC OF KENYA



KENYA LAW
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**Mugane v Kenya Revenue Authority (Cause E449 of 2020)
[2023] KEELRC 3220 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3220 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E449 OF 2020
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

DAVID MUGANE CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of claim on 28.08.2020 through Kariuki Karanja & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a. A declaration that the claimant's dismissal or termination was unfair, unlawful, unprocedural and wrongful.
 - b. Termination benefits and compensatory damages as expounded at paragraph 29 above at Kshs 1,215,000/= being:
 - i. 12-months' compensation Kshs 90,000 x 12 = Kshs 1,080,000.00.
 - ii. One-month payment *in lieu* of notice Kshs 90,000.00.
 - iii. Service pay at 90,000/2 x 1 year served= Kshs 45,000.00.
 - iv. Total claim Kshs 1,215,000.00.
 - c. Interest on (b) above at courts rate
 - d. Damages for breach of claimant's constitutional rights to fair labour practices and fair administrative action under Articles 41 and 47 of the *Constitution* of Kenya, 2010 respectively.
 - e. Certificate of service for claimant.
 - f. Cost of the suit



- g. Any other relief that the Honourable Court may deem fit to grant.
2. The Response to Claim was filed on 24.07.2023 through Chelang'at Mutai Advocate. The respondent prayed that the suit be dismissed with costs.
 3. The claimant's case was that he was employed by the respondent as a Block Management Strategy Staff (BMS)- Nairobi county on 03.09.2018 under a fixed term contract for a period of three months expiring on 30.11.2018. On 01.12.2018 the respondent extended his contract for a period of six months expiring on 31.06.2019. Thereafter, on 01.03.2019 his fixed term contract was amended where his position was changed to that of a clerk and extended for a period of three (3) years ending 28.02.2022 (this appearing an erroneous date).
 4. That on 18.07.2020 through a letter dated 23.07.2019 the claimant's position was changed to that of officer in DTD-Block management strategy, with a salary increase from a monthly gross of Kshs 48,000 to Kshs 68,000 which was later upgraded to Kshs 90,000 effective January 2020.
 5. On 18.11.2019 the claimant states he received a letter requiring him to explain his absence for the period 31.10.2019 to 16.11.2019. That the said letter directed the human resource department to deduct his salary for the same period, before the claimant was heard.
 6. By a letter dated 21.11.2019 the claimant responded to the letter dated 18.11.2019 wherein he explained his whereabouts and attached relevant evidence.
 7. On 20.01.2020 the claimant received a letter dated 31.12.2019 from the deputy commissioner – human resource requiring him to explain his whereabouts for the 17 days, the same days he had been earlier required to give an account for.
 8. That on the same day, the claimant repeated his explanation as regards his whereabouts and attached the relevant documentation to support it. He explained that on 3rd and 4th September 2019 he was sick, and that he sent a sick sheet to his supervisor Mr. Eliud Okwaro and his assistant Daniel Olwanda.
 9. As regards 10.09.2019, the claimant stated that he had been summoned by criminal investigation department at Kingero police station, Lower Kabete in regard to a case he had reported there concerning threats to his life, and the case reference OB No. 59/17/7/19.
 10. As regards 17.09.2019 he stated that he was unwell, which was known to his manager Mr. Eliud Okwaro, to support this claim he attached copies of text messages that he had sent to his manager informing him of his sickness. On 26.09.2019 and 27.09.2019 he was taken ill to Mp Shah Hospital and sent his sick sheet to his manager Mr. Eliud Okwaro and his assistant Daniel Olwanda.
 11. He further explained that he was on leave from 30.09.2019 and his leave was to end on 18.10.2019 but since 10.10.2019 was declared a public holiday, and which he had considered as a leave day, he recovered the same on 23.10.2019.
 12. From 31.10.2019 to 08.11.2019 his father was taken ill at St Mary's Hospital. The claimant states that he is the only son and as such he had no option but to immediately take up the responsibility of taking care of him. He informed the chief manager Ms. Judith Njagi, and his supervisor Ms. Karen, Mr. Eliud Okwaro and Mr. Benson Mugo of his predicament.
 13. For the period 13.11.2019 to 15.11.2019 the claimant stated that he fell ill and visited MP Shah hospital for treatment, and sent a sick sheet to Mr. Eliud Okwaro.
 14. On 19.11.2019 the claimant stated he that he reported to work late for reasons that he had to go back to pick his laptop from the house. This was due to the fact that the respondent had not issued him with



- any official laptop or computer for his official duties and as such he had to carry his personal laptop from home every day.
15. The claimant's case is that at all material times when he was on leave or absent, the same had been notified to the relevant authorities as per the respondent's code of conduct clause 5.1.1.
 16. On 06.03.2020 the claimant received a termination letter from the respondent's deputy commissioner -Human resource. In the said letter it was stated that the claimant had failed to appear for a hearing before a disciplinary committee on 29.01.2020, to which the claimant states he was not aware of, having not received an invitation for the hearing.
 17. On 16.03.2020 the claimant through his advocate, wrote to the respondent appealing the decision of the respondent to terminate his employment on the ground that he had never received any invitation for a disciplinary hearing.
 18. The claimant maintains that the respondent's decision to terminate his employment on account of alleged absenteeism was harsh in the circumstances. That the respondent's code of conduct at clause 5.1.5 provides a remedy for the same. The same states;

“ when an officer has been absent from duty without permission and subsequently resumes duty he/she shall not be eligible for payment of salary for the period of absence and any amount erroneously paid to him shall be recovered from his salary.”
 19. That by a letter dated 08.06.2020 the respondent declined the claimant's request for an appeal.
 20. The claimant maintains that he served the respondent diligently and this can be seen in the respondent promoting him as well as extending his terms of contract periodically and sometimes even before the expiry of the existing contracts.
 21. That throughout his employment he had never had any disciplinary or warnings issued to him. Despite the fact that he had never been issued with a laptop, the claimant states that he was committed and dedicated and used his own laptop for official duties.
 22. On the part of the respondents it is stated that the claimant's contract was terminated on 06.03.2020 for absenteeism. That the claimant absented himself from duty without permission or lawful cause on 3rd, 4th, 10th, 17th, 26th and 27th September 2019 and that he absconded duty on 23rd and 31st October 2019.
 23. The respondent states that the claimant's medical transactions he only accessed medical services in most occasions past the working hours as follows;

On 15.11.2019 at 14:35, on 13.11.2019 at 17:33, on 26.09.2019 at 18:20, on 13.11.2019 at 16:14, on 03.09.2019 at 19:06, on 03.09.2019 at 16:01, 13.11.2019 at 17:16
 24. That on these occasions the claimant did not inform his supervisors of his whereabouts the whole day before attending hospital.
 25. The respondent maintains that the claimant was invited to appear before the disciplinary panel on 29.01.2020 for oral representation on his absenteeism, the same was communicated through lotus and a phone call.
 26. Despite the invitation the claimant did not appear before the disciplinary panel meeting held on 29.01.2020 upon which a recommendation was made to terminate his services.



27. The claimant appealed against the termination of his services through Kariuki Karanja & Co advocates vide a letter Ref: SK/GF/2020 dated 16.03.2020 which is contrary to the authority's disciplinary procedure since he had not exhausted the internal administrative mechanism. That by involving an outsider in the appeal process, the officer overlooked a step.
28. The respondent maintains that the claimant committed an offence that amounts to statutory gross misconduct as per section 44.4(a) of the Employment Act as well as Clause 6.1.1. of the respondent's code of conduct which provides for summary dismissal, however, the respondent was lenient in terminating the claimant's services and paid the claimant one month's salary in lieu of notice instead of summary dismissal.
29. The respondent states that the claimant has misinterpreted clause 5.1.1 of the code of conduct, and that the clause envisages a situation where the claimant's dues are to be calculated upon summary dismissal and not as a right to return to work.
30. The respondent maintains that the termination of the claimant was in accordance with the Employment Act and Kenya Revenue Authority's Code of Conduct, and it was procedural, lawful and justifiable.
31. The parties filed their respective submissions. The Court has considered the parties' respective cases and makes finding as follows.
32. To answer the 1st issue the Court returns that the parties are in agreement that they were in a contract of service.
33. To answer the 2nd issue the Court returns that the contract of service was terminated by the letter dated 06.03.2020. The reason for termination was that the claimant absented himself from duty without permission or lawful cause for a total of 17-days per the days in the show cause letter. Further, the claimant had failed to attend the disciplinary hearing on 29.01.2020 despite having been informed to attend. The letter stated his conduct amounted to breach per section 44(4) (a) of the Employment Act and clause 6.1.1 of respondent's code of conduct.
34. The 3rd issue is whether the termination was unfair. In his response to the show cause notice dated 18.11.2019 by his memo dated 21.11.2019 the claimant stated in part, " Lastly, I would like you accept that I did not get formal leave before embarking of my journey and being absent for 7 days but, a deduction of (4) days of the remaining leave days from (7) days leaves (3) days and out of courtesy I informed everyone that was concerned of my emergency." By that response, the Court returns that the claimant had confirmed that he had been absent as was alleged against him and without permission as admitted in his response. Further, in cross-examination the claimant stated that on 17.09.2019 he was absent and availed no sick leave chit to the respondent. The claimant has denied that he received the letter dated 30.12.2019 inviting him for disciplinary hearing. RW testified that the letter of 31.12.2019 may not be confirmed to have reached the claimant in view of the mix-up in the cell phone number it appears to have been send to and which did not belong to the claimant. While it is true that the claimant was not aware of the disciplinary hearing, the Court returns that in his response to the letter to show cause he had admitted to being absent as earlier quoted in this judgment. The termination letter cannot be faulted for finding that absence without permission or lawful cause had been established. On the material on record the reason for termination was substantially genuine per section 43 of the Employment Act and it was as well fair and a fair procedure invoked as envisaged in section 45 of the Act. The termination was not unfair.



35. The 4th issue is on remedies. The claimant is entitled to the certificate of service per section 51 of *the act* and in that consideration, each party to bear own costs of the proceedings. The other remedies will collapse as the termination has been found not unfair.

In collusion the suit is hereby determined with orders:

- a. The claimant to deliver the certificate of service in 30-days from today.
- b. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

