



Ndolo v Artcaffe' Coffee & Bakery Ltd (Employment and Labour Relations Cause 569 of 2018) [2023] KEELRC 3228 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3228 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 569 OF 2018
BOM MANANI, J
DECEMBER 7, 2023**

BETWEEN

LINAH MWENDWA NDOLO CLAIMANT

AND

ARTCAFFE' COFFEE & BAKERY LTD RESPONDENT

JUDGMENT

1. This suit seeks to challenge the validity of the Respondent's decision to terminate the Claimant's contract of service. The Claimant contends that the Respondent did not have reasonable grounds to terminate her said contract. Further, she avers that the decision to terminate the contract was arrived at in violation of due process.
2. As a result, she prays for an order declaring the impugned decision as unlawful. As well, she prays for inter alia, compensation for unlawful termination of the contract.
3. On the other hand, the Respondent takes the position that the decision to sever the employment relation between the parties was informed by genuine reasons. Further, the Respondent contends that the decision was rendered in accordance with due process. Consequently, it is the Respondent's prayer that the instant claim be dismissed with costs.

Claimant's Case

4. The Claimant avers that she was taken ill whilst at work on 27th November 2017. As a result, she requested the branch manager to facilitate her transport to her house, a request that was granted.
5. The Claimant avers that she subsequently underwent treatment whilst at home but her condition did not improve. As a result, she requested the branch manager to grant her more time off duty until 17th December 2017. She indicates that this request was granted.



6. According to the Claimant's averments in the Memorandum of Claim, her lawyers' letter dated 21st February 2018 and her written witness statement, she was still unwell as at 17th December 2017. Consequently, she did not resume duty contrary to the earlier expectation that she would resume by this date. Instead, she reported back on 5th January 2018.
7. The Claimant contends that prior to extending her absence beyond the reporting date in December 2017, she called her branch manager in order to inform him of her predicament and seek for more time off duty. However and according to her, the manager did not respond to her telephone calls. Nevertheless, the Claimant avers that she opted to stay at home on her doctor's advice until 5th January 2018 when she reported back after she allegedly had been given a clean bill of health.
8. The Claimant accuses the Respondent's management of mishandling her when she resumed duty on 5th January 2018. She contends that on this day, she went to the Respondent's Human Resource Officer's office to deliver her medical records only for the documents to be rejected. Further, she contends that the Respondent's management informed her verbally that her contract of service had been terminated for having allegedly absconded duty.
9. The Claimant avers that the Respondent's decision to terminate her contract did not take into account the fact that she had been prevented from being on duty due to ill health. Further, she avers that the Respondent terminated her services without issuing her with the requisite notice to terminate her contract and without taking her through a disciplinary process. As a result, it is the Claimant's contention that the decision to terminate her contract was contrary to law.
10. The Claimant also contends that during the currency of her contract, the Respondent denied her a number of entitlements. These include house allowance and her annual leave.
11. Through her advocates' demand letter dated 21st February 2018, the Claimant cites her ill health as the reason for her failure to report to work on 17th December 2017. The same justification is implied in her Memorandum of Claim and witness statement dated 16th April 2018. Yet, in her oral testimony in court, she indicates that she was prevented from reporting back on duty because of her bereavement.
12. In the Claimant's advocates' letter dated 21st February 2018 and her written witness statement, she contends that after it became apparent that she could not report to work on 17th December 2017 due to her persistent illness, she sought to extend her off duty days beyond 17th December 2017. However, her efforts were allegedly rendered unsuccessful after her manager purportedly avoided to pick her telephone calls in order to approve her request. Yet, in her oral testimony in court, she suggests that she sought and obtained time off duty until 5th January 2018 when she went back to work.
13. At paragraph 11 of the Reply to Memorandum of Reply, the Claimant asserts that after her manager allegedly declined to pick her telephone calls on 17th December 2017, she sent her husband to the Respondent's offices to procure extension of her off duty days. She asserts that her husband managed to secure the extension. This is notwithstanding the contradictory position that she expresses on the matter through her witness statement and her lawyers' letter dated 21st February 2018.

Respondent's Case

14. On its part, the Respondent contends that after the Claimant became ill on 27th November 2017, an offer was made to take her for medication but she declined. Instead, she insisted that the Respondent organizes for her transport back to her house, a request that was granted.
15. The Respondent avers that the Claimant was expected back on duty on 4th December 2017. However, she called to indicate that she was still not well and requested for more time away from work.



16. The Respondent contends that upon the aforesaid request, the Claimant was allowed time off until 17th December 2017. The Respondent states that the Claimant was required to report back on 17th December 2017.
17. According to the Respondent, its branch manager called the Claimant on 16th December 2017 to remind her of the requirement to report to work the following day (17th December 2017) as she had been included in the day's shift schedule. However, the Claimant allegedly called back later the same day to state that she was unable to report back as instructed as she was bereaved.
18. The Respondent contends that notwithstanding the Claimant's request to be away, its branch manager advised her to report on 17th December 2017 with an assurance that her request will be processed thereafter in accordance with the Respondent's policies on bereavement of staff. However, she did not show up at work on 17th December 2017.
19. The Respondent states that following this development, the branch manager reported the Claimant's absence to its (the Respondent's) Human Resources Officer. Consequently, the Human Resource Officer unsuccessfully tried to contact the Claimant through the telephone contacts in her records.
20. According to the Respondent, some of the telephone numbers were off air whilst others went unanswered. Eventually, the Claimant allegedly switched off all her telephone lines.
21. The Respondent contends that after all efforts to reach the Claimant proved futile, it (the Respondent) considered that she had repudiated her contract with it (the Respondent). As a result, a decision was taken to terminate her contract of service.
22. On the claim for house allowance, the Respondent contends that the Claimant's salary was consolidated. As such, she was not entitled to house allowance as a standalone item.
23. In respect of annual leave, the Respondent acknowledges that the Claimant was entitled to twenty one (21) days leave for every year worked. However and according to the Respondent, she had utilized all her leave days during the currency of her contract.

Issues for Determination

24. After analyzing the pleadings and evidence on record, I am of the view that the following are the issues that require determination in the cause:-
 - a. Whether the Claimant was expected back on duty on 17th December 2017 and whether the decision to terminate her contract was made on 17th December 2017.
 - b. Whether the Claimant's contract of service was unfairly terminated.
 - c. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

25. In this section, the above set of issues will be evaluated sequentially. Thereafter, the final orders will follow.

Whether the Claimant was expected back on duty on 17th December 2017 and whether the decision to terminate her contract was made on 17th December 2017

26. During cross examination, the Claimant stated that she was supposed to have resumed duty on 18th December 2017. By this, the Claimant implies that she was not required to have been on duty on



- 17th December 2017 when the Respondent terminated her services. The suggestion is that her (the Claimant's) off days included 17th December 2017.
27. In their submissions, counsel for the Claimant contend that the Respondent could not have legitimately terminated the Claimant's contract on 17th December 2017, a day that she was allegedly lawfully away from her work station with the Respondent's permission. They submit that the Claimant cannot be said to have absconded duty when she was on off duty with the Respondent's permission.
28. Notwithstanding the above assertions, the Claimant's own evidence demonstrates that she was aware that she was required to have resumed duty on 17th December 2017. In her lawyers' letter dated 21st February 2018, they are quoted as stating as follows on the matter:-
- “...while our client was planning to resume back to work on the 17th December 2017, she fell ill again.....”
29. Further, in the Respondent's Memorandum of Reply, the Respondent's witness statement dated 20th March 2023 and the Respondent's lawyers' letter dated 28th March 2018 which was tendered in evidence, it is averred that the Respondent's manager called the Claimant on 16th December 2017 and advised her to report to work on 17th December 2017. These averments fortify the reality that both parties were aware of and understood that the date for resumption of duty by the Claimant was 17th December 2017 and not 18th December 2017 as the Claimant later tried to suggest during her cross examination.
30. In the Claimant's Advocates' letter dated 21st February 2018, they affirm the fact that their client was required to have resumed duty on 17th December 2017 but did not. It is therefore more probable than not (notwithstanding the discrepancies in the Respondent's letter of 17th December 2017) that the decision to terminate the Claimant's contract was made on 17th December 2017 after she failed to show up at work.
31. As such, the court arrives at the conclusion that both parties to the action were aware of and understood that the Claimant was expected to have resumed duty on 17th December 2017 and not 18th December 2017. The court also finds that the decision to terminate the Claimant's contract was made on 17th December 2017 after she failed to turn up at her work station.

Whether the Claimant's contract of service was unfairly terminated

32. The parties have taken contrasting positions on the events that surround the Claimant's absence from duty on 17th December 2017. On the one hand, the Claimant has, through her lawyers' letter of 21st February 2018 and her witness statement dated 16th April 2018, accused the Respondent's branch manager of having refused to respond to her telephone calls through which she allegedly had intended to request for permission to be away as from 17th December 2017. On the other hand, the Respondent's witness states that the Claimant in fact had a conversation with the Respondent's branch manager on 16th December 2017 during which she was reminded to resume duty on 17th December 2017.
33. From the foregoing, it is apparent that one of the actors in the litigation has been less than candid regarding what exactly transpired on the date under review. This absence of candidness inevitably affects the credibility of the evidence of such party.
34. Through her lawyers' letter dated 21st February 2018, the Claimant suggests that she was unable to secure permission to be off duty from 17th December 2017 because the Respondent's branch manager



- allegedly refused to answer her telephone calls in order to approve her request. Yet, at paragraph 11 of her Reply to Memorandum of Reply, she asserts that she secured this permission through her husband.
35. The foregoing demonstrates that the Claimant was inconsistent regarding whether she secured the Respondent's permission to be off duty from 17th December 2017. This inconsistency casts aspersions on her credibility as a witness.
36. At paragraphs 14 and 15 of the Memorandum of Claim, the Claimant is quoted as stating as follows regarding the reason for her absence from duty from 17th December 2017:-
"The Claimant took sick leave but the situation worsened whereupon she took an extended sick leave up to 17/12/2017.
The Claimant was unable to report to work due to prevailing illness that lasted up to 3rd January 2018 when she was recommended fit to resume duty by her doctor." Emphasis added by underlining.
37. At paragraph 7 of her written witness statement, the Claimant expresses herself as follows on the matter:-
"I applied for sick leave and was granted one which was extended owing to the persistence of my illness till 17/12/2017. However, owing to my state of sickness then, I was advised by my doctor that I needed further rest away from work. On this basis, I called the Respondent through the manager to inform him of the doctor's advice but without success.
Upon recovery, I reported to work on 5th January 2018 with the medical report but was turned away by Catherine, the HR Manager Westgate branch." Emphasis added by underlining.
38. In the Claimant's lawyers' letter dated 21st February 2018, they state as follows on the same issue:-
"... while our client was planning to resume back on the 17th December 2017 she fell ill again and upon her doctor's recommendation she took a further medical leave owing to this predicament....." Emphasis added by underlining.
39. During her cross examination in court, the Claimant expressed herself on the subject as follows:-
"I was expected to resume on 18.12.2017.
I got another personal problem.
I lost a relative.
I asked for extension of time off.
I went back on 5.1.2018
This was about 1 month after I left work." Emphasis added by underlining.
40. Evidently, the reasons which the Claimant gave in the Memorandum of Claim, her lawyers' letter of 21st February 2018 and her witness statement to explain her failure to resume duty as from 17th December 2017 differ from those which she gave during her oral testimony in court. Whilst in the Memorandum of Claim, her lawyers' letter of 21st February 2018 and her witness statement, she suggests that she did not resume duty because of her ill health, in her oral evidence in court she suggests that she did not report back on the appointed date because of her bereavement.



41. The Claimant also fell into contradiction regarding the date that she was to have resumed duty. In her oral testimony in court, she states that she was required to have resumed on 18th December 2017. Yet, in her lawyers' letter dated 21st February 2018, they state that she was expected to resume on 17th December 2017.
42. It is worth noting that the Claimant swore an affidavit to verify the correctness of her averments in the Memorandum of Claim. It is also noteworthy that her oral testimony, during which she produced her lawyers' demand letter dated 21st February 2018, was given under oath. Yet, her position on various matters in the two instances is contradictory.
43. To support her assertion in her pleadings that she was prevented from resuming duty around 17th December 2017 because of sickness, the Claimant produced a medical report from Fremo Medical Centre dated 3rd April 2018. The report suggests that the Claimant's ailment of 27th November 2017 was gradually managed on outpatient basis until some point when it subsided. However, she allegedly became ill again as from 23rd December 2017 when she presented symptoms of acute septic peritonitis.
44. In effect and contrary to the Claimant's suggestion that she remained unwell throughout the period between 27th November 2017 and 3rd January 2018, this report suggests that her condition of 27th November 2017 was managed at some point. Indeed, this fact is confirmed by her advocates' letter of 21st February 2018 when they say that their client suddenly became unwell again when she was preparing to resume duty.
45. The Claimant did not provide medical evidence to demonstrate that she was unwell on 17th December 2017 when she was expected at work. Whilst her lawyers' letter of 21st February 2017 insinuates that she was suddenly taken ill around 17th December 2017, no medical evidence was tendered to fortify this assertion.
46. The medical report from Fremo Medical Centre does not support the assertion that the Claimant was unwell from 17th December 2017. On the contrary, it shows that she reportedly developed tonsillitis on 23rd December 2017.
47. The totality of the foregoing casts considerable aspersions on the credibility of the Claimant's testimony. Her attempts to hide under the cover of sickness to justify her failure to report to work on 17th December 2017 does not find support in the documents that she has presented before court. Further, her contradictory accounts regarding the reason why she did not show up at work as from 17th December 2017 (or 18th December 2017 as she suggests) do not assist her case.
48. In the face of these contradictions in the Claimant's pleadings and evidence, I am unable to reach the conclusion that she had a valid reason to stay away from work on 17th December 2017. The ambivalence in her testimony renders her an unreliable and unbelievable witness.
49. As a result, I am inclined to believe the Respondent's evidence that the Claimant was reminded on 16th December 2017 that she should report back to her work station on 17th December 2017 but failed to do so without the Respondent's permission or lawful cause. On the other hand, I am unable to believe the Claimant's testimony on account of her ambivalence on the various matters that have been highlighted in this judgment.
50. Section 44 (4) (a) of the *Employment Act* identifies absence from duty without lawful cause or without permission of the employer as one of the grounds that may lead to the summary dismissal of an employee. In the instant case, it is apparent from the evidence on record that the Claimant did not



furnish the Respondent with evidence that she was unwell on 17th December 2017. The document that she relies on to establish this fact refers to an ailment that set in on 23rd December 2017. Similarly, despite the Claimant's oral testimony that she was bereaved around that time, she did not avail proof of this to her employer. Thus, there is no evidence to suggest that she (the Claimant) had lawful cause to be away from her workstation on 17th December 2017.

51. There is also no evidence to demonstrate that before the Claimant decided not to report to work on 17th December 2017, she had sought and procured the Respondent's permission to be absent from the workplace on this day. The Respondent's witness denied that such permission had either been sought or granted. On the other hand, the Claimant did not provide evidence to demonstrate that she sought this permission.
52. Having regard to the foregoing, I am satisfied that the Respondent had valid reasons to consider terminating the Claimant's contract of service. By staying away from her workplace on the aforesaid date without lawful cause and or permission, the Claimant committed an act of gross misconduct under section 44 of the *Employment Act* for which the Respondent was entitled to consider terminating her services.
53. The Respondent's decision may appear to have been harsh given that the Claimant was apparently punished for failure to resume duty on the first day after the lapse of her off duty days. However, this alone cannot be the basis for the court to upset the employer's decision. A single act of gross misconduct is sufficient to justify a decision by the employer to terminate an employee's contract of service.
54. As long as the employer's reaction to the incident falls within the band of reactions that another reasonable employer, faced with a similar set of facts, would reasonably have had, the court is not entitled to interfere with the decision. To do otherwise would be tantamount to unjustified interference with the exercise of the employer's prerogative at the workplace. The court cannot seek to substitute the employer's decision with its own merely because the judicial officer considers that had he been in the employer's shoes, he would have handled the matter differently.
55. Alluding to this reality, the Court of Appeal in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others* [2019] eKLR expressed itself as follows:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

56. It is correct as the Claimant contends that before an employer can terminate an employee's contract of service, he (the employer) must establish that there is a valid reason to support his decision. Further, the employer must uphold due process in processing his decision. In this respect, the employer is expected to notify the employee of the infraction that he (the employee) is accused of and permit the employee an opportunity to be heard in response to the accusation.



57. However, this requirement presupposes that the employee is available and ready to be heard on the matter. It would be arduous to require an employer to subject an employee who is accused of workplace infractions to a disciplinary hearing if the employee is shown to be unreachable despite reasonable effort to reach out to him.
58. Where an employee does not facilitate the disciplinary process by availing himself of it despite efforts to get him, all that the employer is required to demonstrate before he terminates the employee's contract is that he has done what is practicably reasonable to access the employee without success. The employer may demonstrate this by providing evidence to show that he unsuccessfully tried to contact the employee through his last known telephone contacts or by email or even through the employee's relatives.
59. Once cogent evidence in this respect is presented, the court will hardly fault the employer's decision to terminate the employee's contract. Indeed, this is what I understand the learned Judge in *Felistas Acheha Ikatwa v Charles Peter Otieno* [2018] eKLR to have been stating.
60. In discussing the employer's duty in a disciplinary process where an employee has deserted duty, the learned Judge in *Stanley Omwoyo Onchweri v Board of Management Nakuru Ymca Secondary School* [2015] eKLR expressed himself as follows:-
- “The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary.” Emphasis added by underlining.
61. In the instant case, the Respondent states at paragraph 14 of its defense that after the Claimant failed to show up at work on 17th December 2017, her immediate supervisor reported the incident to the Respondent's Human Resource Manager. In turn, the Human Resource Manager unsuccessfully tried to call the Claimant through a series of telephone numbers that she had supplied to the Respondent as her contacts. According to the Human Resource Manager, most of the telephone numbers had either been switched off or they went unanswered.
62. The Respondent also avers that its officers sent the Claimant a number of short text messages asking her to report to its (the Respondent's) Human Resource office but got no response from her. At the same time, the Respondent contends that the Claimant did not return the unanswered telephone calls from the office.
63. The above averments are reiterated at paragraph 11 of the Respondent's witness statement dated 20th March 2023. They are also alluded to in the Respondent's lawyers' response to the Claimant's demand letter.
64. During her oral testimony, the Respondent's witness adopted the aforesaid witness statement as her evidence in chief. In addition, she produced the Respondent's lawyers' letter of 28th March 2018 as part of the Respondent's evidence. It is also worth of note that this evidence was tendered on oath.
65. Apart from the bare averment in the reply to defense in which the Claimant disputes the fact that the Respondent tried to contact her on 17th December 2017, she (the Claimant) did not present any evidence to controvert the Respondent's evidence on this issue. In both her written witness statement and her oral evidence in court, the Claimant did not challenge the Respondent's case that efforts to reach her on 17th December 2017 did not yield fruit.



66. In the premises, the Respondent's evidence in this respect remains unchallenged. The Respondent's evidence on the matter having been tendered on oath and the Claimant having failed to rebut it by contra evidence, the court considers it sufficiently persuasive. It is accepted as such.
67. On the basis of the foregoing, I am satisfied that the Respondent did all that was sensibly expected of it to reach the Claimant in a bid to interrogate her misconduct but to no avail. It would be onerous to expect the Respondent to have done more than it did in the circumstances.
68. By failing to report to work on 17th December 2017 without lawful cause and without the Respondent's permission, the Claimant exhibited her intent not to be bound by her obligations under the contract of service. By this conduct, she exhibited her intent not to honour the duty to be at work as and when she was expected to have been at work.
69. By this conduct, the Claimant exhibited her intent to repudiate the contract of service between the parties. As a result, the Respondent having done what was reasonably expected of it to reach out to the Claimant without success, was entitled to terminate her contract of service. It is so declared.

Determination

70. In the ultimate, I make the following findings and orders in the matter:-
- a. The Respondent's decision to terminate the Claimant's contract of service was informed by valid reasons and complied with due process.
 - b. Consequently and save for the prayer for issuance of a Certificate of Service under section 51 of the *Employment Act*, the Claimant's suit against the Respondent is without merit and is hereby dismissed.
 - c. The Respondent is directed to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
 - d. The parties are at liberty to process the Claimant's exit dues in terms of the Respondent's letter to the Claimant dated 17th December 2017.
 - e. Since the Respondent is the successful party in this action, it (the Respondent) is granted costs of the action.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE

