



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1924 OF 2016

AUSTIN OPELE OKUNJA.....CLAIMANT

VERSUS

SENACA EAST AFRICA.....RESPONDENT

JUDGEMENT

1. The parties herein are not in contest as to the existence of the employment relationship. What is in contest is the manner in which the same was terminated and the benefits payable thereunder.

2. The claimant through his memorandum of claim dated 8th September, 2016, avers that the respondent unlawfully terminated his services when it denied him access to his work station. The claimant further averred that he was not taken through a disciplinary process nor paid his terminal dues. As such, he seeks compensatory damages, notice pay, refund of uniform deductions, compensation for unpaid leave days and public holidays.

3. The respondent denied the claimant's averments and asserted that it is him who absconded duty for no justifiable reason. It further stated that the claimant had failed to report back for purposes of clearance so as to allow for payment of his terminal dues.

4. The matter proceeded for hearing on 9th November, 2021 and each side called one witness.

Claimant's case

5. The claimant took the stand and testified in support of his case. At the commencement of the hearing, he adopted his witness statement to constitute part of his evidence in chief. He also produced his bundle of documents filed together with the claim as exhibits before Court.

6. He informed court that he was employed by the respondent as a security guard sometimes in May, 2012. That on 12th April, 2015, while he was stationed at Highlands Hotel, he was attacked and injured by unknown people. Therefore, he sought medical attention from Huduma Medical Complex at Kibera where he was treated and discharged. He stated that he was given 2 days off to enable him recuperate. That when he reported back to work, he was assigned a new work station, which happened to be Chase bank at Riverside. That since he was still recuperating from his injuries, he had preferred a work station within the Central Business District (CBD) area but nonetheless, he obliged and reported to work as required.

7. The claimant further averred that shortly afterwards, he fell ill once again since he had not fully recovered from the injuries he had sustained from the attack at Highlands Hotel, hence he went back to the hospital for further medical attention where he was treated and given 3 days sick off. That afterwards, he reported back to work but was turned away and instructed to contact the respondent's headquarter offices. That from the headquarter offices, he was instructed to go back home and await further communication, which was not forthcoming, hence the instant suit. He summed up his testimony by stating that he was not taken through a disciplinary process nor paid his terminal dues, hence prayed that his claim be allowed.

Respondent's case

8. The respondent tendered oral evidence through Ms. Mercy Bonareri, its Human Resource Manager, who testified as RW1. At the outset, she adopted her witness statement to constitute part of her evidence in chief.

9. RW1 denied the assertions by the claimant that he was terminated. On her part, she stated that while the claimant was stationed at Highlands Hotel, he fought with clients contrary to the respondent's Guidelines and Policy. That as a result of the fight, the claimant sustained injuries hence he was given 2 days sick off. That the claimant was thereafter required to avail the medical documents for onward transmission to the respondent's insurer but he failed to do so and never reported back to work. That further the claimant never cleared from the respondent as required hence his terminal dues could not be processed.

Submissions

10. Both parties tendered written submissions upon close of the hearing. The claimant submitted that his employment was terminated unlawfully and unfairly contrary to the provisions of sections 45 (1) and (2) of the Employment Act, as he was not given reasons for the termination nor taken through a disciplinary hearing. In support of his submissions, the claimant invited the court to consider the authorities of **Claire Vike vs Alexandria Cancer Centre & Palliative Care Hospital (2018) eKLR**. He further submitted that he did not abscond duty and if he did, the respondent had not demonstrated that it tried reaching him so as to ascertain his whereabouts. On this issue he cited several authorities including **Boniface Francis Mwangi vs BOM Iyego Secondary School (2019) eKLR**, **Kenya Union of Commercial Food & Allied Workers Union vs Selections Limited (2017) eKLR**, **Simon Mbithi Mbane vs Inter Security Services Limited (2018) eKLR** and **Joseph Nzioka vs Smart Coatings Limited (2017) eKLR**.

11. The respondent submitted that the claimant's employment was not terminated and that indeed, he had failed to discharge the legal burden under section 47(5) of the Employment Act and section 107 of the Evidence Act as he had failed to prove the fact of the termination. It relied on the case of **Protus Wanjala vs Anglo African Properties t/a Mutara Lodge Laikipia (2021) eKLR**. It further submitted that indeed, it is the claimant who had breached his employment contract by absconding duty. On this issue, it placed reliance on the case of **Daniel Mueke vs Bhogals Auto World (2014) eKLR**.

Analysis and determination

12. I have considered the pleadings on record, the evidentiary material before me and the rival submissions, and find that the issues for determination are;

i. Whether the claimant absconded duty hence a justifiable reason to warrant termination?

ii. Whether the respondent complied with the requirements of fair hearing?

iii. Is the claimant entitled to the reliefs sought?

Whether the claimant absconded duty hence a justifiable reason to warrant termination?

13. Both parties have presented different versions as to how the employment relationship ended. Whereas, the claimant avers that he was terminated when he was denied access to his work station, the respondent contends that he absconded duty.

14. It is therefore important to dissect the facts herein and consider the same against the evidence presented as well as the applicable law. This task is monumental as the parties have not availed the evidence necessary to guide the court accordingly. To say the least, the evidence on record is very scanty but nonetheless, I must and will proceed to determine the matter with the material before me.

15. As stated herein, the respondent has asserted that the claimant absconded duty, a fact he has vehemently denied. It is not in dispute that the claimant was unwell from 12th April, 2015. This fact has been admitted by the respondent and there are treatment notes on record to ascertain the same. Further, on record is a Dispatch Slip dated 16th July, 2015 confirming the claimant's deployment to Chase Bank Riverside. I would therefore presume that that is the date the claimant resumed duty following his sick off.

16. The claimant avers that he was still feeling unwell, thanks to the injuries he had sustained from the attack at Highlands hotel, hence he sought further treatment whereupon he was granted 3 days sick off. This assertion notwithstanding, the claimant has not produced any treatment notes to evidence this assertion. Indeed, there is no evidence from his end, to confirm that he sought treatment for a second time and was granted a sick off.

17. Pursuant to **Section 30 (1) of the Employment Act**, an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.

18. More importantly, **subsection (2) of section 30** provides that **"For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it."**

19. As stated herein, it is not in dispute that the claimant initially sustained injuries hence was unable to attend to his normal duties in the days that followed. It is on this premise that he was granted sick off. However, upon reporting back to work and being posted to Riverside, he alleges that he was still unwell, thus sought further treatment. This assertion notwithstanding, he has not availed any medical documents to prove the same. Hence the question is, was the respondent aware of the claimant's subsequent second treatment and 3 days sick off?

20. The Act has placed a burden on the employee to notify the employer of the reasons for his absence in order to be entitled to sick leave. In this case, the claimant did not state whether he notified the respondent of his second treatment and whether he applied for sick leave as required. Indeed, he has not attached any evidence to indicate that he forwarded the second medical report or treatment notes and doctor's sick off to the respondent, so as to apprise it of his health condition.

21. As the employee in this case and the one in need of the sick leave, it was his duty at all times to keep the respondent posted as regards his medical condition and his readiness or otherwise, to resume duty. It was a grave error on his part to assume that since the respondent was aware of his initial injuries, then it was not necessary to apply for sick leave or at least give a notification to that effect. In any case, sick leave is granted pursuant to a medical report and sick sheet duly signed by a certified medical practitioner. The claimant did not prove that he

had done any of this, hence he acted imprudently in the circumstances. This lends credence to the respondent's assertion that the claimant absconded duty.

22. The respondent having failed to receive any notification from the claimant as regards his subsequent treatment and moroso, a report from a certified medical practitioner, availed it the grounds and cause to take disciplinary action against him for desertion of duty.

23. Accordingly, the respondent had justifiable cause to terminate the claimant's employment on account of abscondment of duty, which notably, is a ground for dismissal under section 44 (4) (a) of the Act.

24. The next issue for determination is whether the respondent followed due process and accorded the claimant procedural fairness prior to terminating his employment.

Whether the claimant was subjected to a fair hearing

25. Procedural fairness is stipulated under sections 45 (2)(c) and 41 of the Employment Act. It requires an employer to notify an employee of the reasons it is considering terminating his services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.

26. In the instant case, the claimant has contended that he was not subjected to a fair process as he avers that upon reporting to work from his sick off, he was told to go back home and await further communication which was not forthcoming.

27. In my view, the respondent having noted the claimant's absence from duty, most probably advised him to go back home and discharged him quietly. Why do I say so? There is no communication at all to the claimant from the respondent's end citing him for abscondment of duty or asking him to show cause why disciplinary action should not be taken against him.

28. As stated herein, the respondent had all the reason to commence disciplinary action against the claimant for abscondment of duty. As such, it was duty bound to comply with all the legal requirements which entailed notifying the claimant of the reasons it was considering terminating his employment in a language he understands and in the presence of an employee of his choice or a union representative. The respondent did not tender any evidence before court to prove that it indeed issued a notification to the claimant to that effect or accorded him a hearing.

29. The total sum of the foregoing is that the respondent ought to have granted the claimant an opportunity to defend himself or rather give his side of the story. It is at this juncture that the claimant would have availed his second treatment notes if any, to prove that there was a justifiable reason for his absence. As I have stated hereinbefore, no evidence was placed before court to prove that this was ever done.

30. Since the parties were in an employment relationship spanning close to 3 years, they must have established channels of communication hence there were means through which the respondent could reach the claimant and notify him of its intention to take disciplinary action against him. There is no evidence that it attempted to do this.

31. In view of the foregoing, it is apparent that despite the fact that the respondent had justifiable cause to terminate the claimant, it did not comply with the statutory provisions constituting procedural fairness.

32. Having established that the respondent as an employer had reasons to justify the termination of the claimant, it had all the right to take disciplinary action against him subject to compliance with the requirements of fair hearing.

33. Evidently, the respondent did not follow the procedure as by law required, hence it is at fault for non-compliance. In the end, the respondent did not subject the claimant to a fair process and thus his termination was not lawful.

34. Having so found, what then are the reliefs available to the claimant?

Reliefs

Unpaid leave days and public holidays

35. These claims have not been proved hence are denied.

One month's salary in lieu of notice

36. As I have found that the claimant was not terminated in line with fair procedure, I will award him one month's salary in lieu of notice.

Compensation for wrongful and unfair termination

37. As I have found that the respondent had valid grounds to terminate the claimant but failed to follow the stipulated procedure, I will award him three (3) months' gross salary in compensation as damages under this head.

Refund of Uniform deductions

38. This claim is denied as the respondent did not prove the deductions either by way of a pay slip or such other document.

Certificate of service

39. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Conclusion

40. In the final analysis, I enter judgment in favour of the claimant as follows:

a) 3 months' gross salary in compensation.....Kshs 36,000.00

b) 1 month salary in lieu of notice.....Kshs 12,000.00

Total Kshs 48,000.00

41. The award will be subject to interest at court rates from the date of judgment until payment in full.

42. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For Claimant Ms. Njuguna

For the Respondent Mr. Muli

Court assistant Barille Sora

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