REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 63 OF 2017

BILLY OMONDI NYAARE.....CLAIMANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 31st October 2013. This contract of service was apparently terminated on 30th October 2014 exactly one year down the line when the Respondent summarily dismissed the Claimant for alleged absenteeism.

2. The Claimant, not being happy with the decision to terminate his services, filed this action against the Respondent seeking the following reliefs: -

a) A declaration that the termination was unlawful.

b) An order for reinstatement and payment of salary from April 2014.

c) Alternatively and order for compensation for unfair termination as pleaded in the Statement of Claim.

d) Costs of the case.

e) Interest.

3. The Respondent has opposed the Claim. It filed a defense on 27th March 2018.

4. From the pleadings, the witness statement, the oral and documentary evidence tendered, it was the Claimant's case that shortly after he was engaged by the Respondent, his wife developed pregnancy complications. This forced the Claimant to leave duty sometime in April 2014 in order to take care of her.

5. The Claimant asserts that before he left his station of work, he notified one Kahindi Yeri, his immediate supervisor. That Kahindi granted the Claimant permission to be absent in order to attend to his sick wife.

6. The Claimant asserts that it was while he was away with permission from Kahindi that he received the Respondent's letter dated 4th June 2014 accusing him of being absent from work without permission and requiring him to show cause why he should not be penalized for this misconduct. The Claimant indicates that he did a response to the Respondent's letter of 4th June 2014. The response is dated 17th June 2014. In the response, the Claimant reiterated that he was absent from duty for a justifiable cause and with the permission of Kahindi Yeri. That his wife had been down with pregnancy complications which forced him to stay at home to take care of her.

7. The Claimant was then invited for a disciplinary session before the Respondent's Disciplinary Advisory Committee. He confirms that he attended this session and was given an opportunity to air out his defense. He indicates that he tabled a report from his wife's doctor dated 19th August 2014 confirming that indeed she had been unwell. However, the committee found his defense unsatisfactory thus dismissing him by a letter dated 30th October 2014.

8. The Claimant asserts that though the Respondent's letter dismissing the Claimant is dated 30th October 2014, he only received it on 10th November 2014. The letter gave the Claimant a right of appeal against the decision to terminate his employment to be exercised within 14

days of the dismissal letter. That upon receipt of the letter on 10th November 2014, the Claimant says that he prepared and sent to the Respondent his appeal against the decision. That the appeal dated 10th November 2014 was dispatched by courier on 11th November 2014.

9. The Claimant asserts that the appeal is deemed to have been lodged with the Respondent on 11th November 2014 the date it was dispatched by courier. Therefore the appeal against the decision was lodged within 14 days as demanded by the Respondent.

10. The Claimant's main grievance is that despite receipt of the appeal, the Respondent did not consider it contrary to its own internal regulations and the Employment Act. That this failure prejudiced the Claimant's right to fair disciplinary process thus rendering the termination unlawful.

11. On its part, the Respondent asserts that when it received information from Kahindi Yeri via an internal memo dated 13th May 2014 that the Claimant had been away from duty without permission from 9th April 2014, it wrote to the Claimant demanding an explanation from him. That the Respondent was not satisfied with the Claimant's response to the notice to show cause thus it invited him for a disciplinary session in compliance with the law. That the Claimant was allowed an opportunity to articulate his defense to the charge of being absent from work without permission that had been framed against him by the Respondent. That the Respondent found the Claimant's explanation unsatisfactory thus it terminated him summarily.

12. The Respondent asserts that it wrote to the Claimant on 30th October 2014 notifying him of the decision to summarily terminate him and inviting him to appeal the decision within 14 days if dissatisfied with it. That the Claimant never filed an appeal as advised and hence the matter ended at that level.

13. The Respondent disputes that the Claimant is entitled to the prayers sought. In particular, it avers that the order for reinstatement should not issue as the Claimant's position has already been filled.

14. In summary, the Respondent takes the position that it processed the Claimant's release in accordance with both the law and its internal procedures. That it observed due process before terminating the Claimant. That as a consequence, the Claimant's suit is without merit and should be dismissed with costs.

15. I have considered the pleadings, evidence and submissions by the parties. I note that neither party formulated issues for determination at the trial stage. However, they did identify issues for determination in their final submissions to court.

16. I must say that the issues as framed in the parties' submissions are at great variance. Therefore, I have to reframe them for ease of preparation of this judgment. In my view, the issues for determination can broadly be discerned as follows: -

a) Whether there was justifiable cause to terminate the Claimant.

b) Whether the Respondent processed the Claimant's disciplinary case before appeal in line with due process as stipulated under its internal procedures and the Employment Act.

c) Whether the Claimant challenged, by way of appeal, the Respondent's decision to summarily terminate him and if yes, whether the Respondent procedurally acted on the appeal.

d) What reliefs is the Claimant entitled to if at all?

17. On the first (1st) issue, I should perhaps begin by reiterating the current position on termination of employment by an employer in Kenya. Section 41 of the Employment Act implies that termination of an employee's contract of service by an employer must be justified on some ground that is recognized in law. The section identifies some of these grounds as: poor performance of work by an employee; physical incapacity of an employee that renders it impossible to discharge his/her duties under the contract of service; and gross misconduct on the part of the employee. The other unrelated ground for termination by an employer is redundancy as set out in section 40 of the Employment Act.

18. In effect, the law on employment in Kenya has since largely abandoned the employment at will doctrine under which, the employer was free to hire and fire employees as he/she pleased. As has been observed in scholarly writings and judicial pronouncements, under this doctrine the employer had the right to terminate a contract of service for whatever cause or for no cause at all.

19. Currently, the law leans towards the good cause doctrine which frowns upon arbitrary termination of employees. By this principle an employer may only terminate an employee for good cause.

20. Apart from finding its grounding in the Employment Act, I would say that the good cause principle is fortified by constitutional provisions. In my view, article 236(a) of the Constitution appears to give weight to this requirement in relation to those serving in public office by forbidding their victimization for performing functions of their office.

21. In relation to this case, the Respondent argues that it terminated the Claimant for gross misconduct under section 44 of the Employment Act. Under the section aforesaid, one of the several grounds that constitute gross misconduct by an employee is when he/she absents himself/herself from the place of work without permission from the employer or other lawful cause.

22. The Respondent has invoked this ground to justify its decision against the Claimant. In the Respondent's view, the Claimant absented himself from work without permission and without lawful cause. The Claimant appears to concede that he was absent but insists that this was

with permission and for valid reasons.

23. From the evidence tendered, the Claimant asserted that he left his work station in April 2014 for some time in order to take care of his sick wife. He says that he was granted permission to be away by one Kahindi Yeri, his immediate supervisor. It is therefore not in dispute that the Claimant was indeed absent from his work station for some time. The Respondent's document dated 13th May 2014, the notice to show cause issued by the Respondent dated 4th June 2014 and the Claimant's response to the notice to show cause dated 17th June 2014 provide evidence that the Claimant was away from work at least between 9th April 2014 and 17th June 2014 when he responded to the Respondent's show case letter.

24. The Claimant says he was away with the permission of Kahindi Yeri. However, Kahindi Yeri, who testified as RW1, denies having granted the Claimant such permission. According to RW1, the Claimant mentioned to him that his wife was unwell. However, the Claimant never sought permission to be away to attend to her. Further, that knowledge by RW1 of the fact of the Claimant's wife being unwell was not synonymous with RW1 giving the Claimant permission to be absent from work.

25. In cross examination of the Claimant, he conceded that he did not apply for permission to be absent from duty in writing. He contended that he only sought the permission orally. This fact is disputed by Kahindi Yeri.

26. I have carefully considered the evidence on this aspect of the case. While the Claimant asserts that Kahindi gave him permission, the said Kahindi denied ever granting such permission. In fact, it is this very same Kahindi that wrote to the Respondent on 13th May 2014 indicating that the Claimant had been away from work from 9th April 2014 without permission. In the letter, RW1 mentions that efforts to get the Claimant to resume duty had proved futile. In cross examination of RW1, he stated that he tried to reach the Claimant on phone to no avail. The question that lingers is why RW1 would write to the Respondent to raise concerns about the Claimant's absence if he indeed had given the Claimant permission to be away. RW1 can only have raised concerns about the Claimant's absence because he did not sanction it. Further, it is incomprehensible why the Claimant, knowing that he will want to be away for quite some time, would fail to request for permission to be away in writing for purposes of record.

27. But even if it were to be accepted that RW1 gave the Claimant permission to be away, this can only have been for a week. This is because at paragraph 10 of the Claimant's response to the notice to show cause, he says that RW1 while allowing him to travel to Kilifi to see his sick wife, asked him to try and resume work within one week from 9th April 2014. This, the Claimant did not do. Instead he stayed on at Kilifi for more than one week and apparently, without permission from anyone at his workplace. In the premises, I find that the Claimant was absent from work, at least one week after 9th April 2014, without permission.

28. The Claimant indicates that he had lawful reason to absent himself from duty. This reason he says was his wife's pregnancy complications. However, he tendered no evidence to demonstrate the nature of the complications and whether they required the presence of the Claimant or some other caregiver for the duration the Claimant was away. All that the Claimant produced before the disciplinary committee was the document dated 19th August 2014 from Khairat Medical Centre explaining that the institution would not provide the medical records of the Claimant's wife without her consent due to patient confidentiality requirements.

29. Since the Claimant's justification for being away from work was his wife's alleged ailment, I think that it was necessary for him to establish this fact at least on prima facie basis. It is not clear why the Claimant did not get his wife to secure some evidence from the institution attending to her to explain that her condition required the presence of a care giver as suggested by the Claimant. In the absence of this evidence, it was not possible for the Claimant to establish before the disciplinary committee that he was away for a justifiable cause. I therefore find that the disciplinary committee was justified in finding that the Claimant had committed an act of gross misconduct by staying away from his workstation for more than two months without permission and or lawful cause.

30. On the second (2nd) issue, I will begin by mentioning that section 41 of the Employment Act requires every employer who wishes to terminate an employee to afford such employee procedural fairness in the process of inquiring into the reason for the proposed termination before reaching the decision to terminate. This requirement also applies to instances where the ground for the proposed termination is gross misconduct. The employee is entitled to be: notified of the complaint against him/her; allowed to answer to the charge; and allowed to call witnesses.

31. From the record, after the Respondent got RW1's letter dated 13th May 2014 notifying the Respondent about the Claimant's absence from duty, the Respondent issued the Claimant with a notice to show cause letter dated 4th June 2014. In my view, the show cause letter comprises the charge-sheet issued to the Claimant by the Respondent. It provided sufficient details of the alleged charge against the Claimant and asked the Claimant to give a response in the nature of a defense within 14 days of the notice to show cause. Further, the notice to show cause warned the Claimant, in sufficient detail, of the consequences that attached to the offense if established.

32. Further, the record shows that the Claimant was invited to a disciplinary session vide the Respondent's letters of 13th August 2014 and 17th September 2014. In the invite of 17th September 2014, the Claimant was reminded to carry along medical evidence which will justify his decision to stay away from duty.

33. In the oral evidence tendered by both the Claimant and the Respondent, the disciplinary session set for 23rd September 2014 proceeded as scheduled. In cross examination of the Claimant, he confirmed that he was heard by the disciplinary committee before it rendered its decision terminating him. That the committee terminated him because it did not find his defense satisfactory.

34. In their pleadings and written witness statements filed in court, neither of the parties casts aspersions on the integrity of the disciplinary session of 23rd September 2014. However, during cross examination of the Respondent's witnesses, the Claimant's counsel questioned why the minutes of the session were not produced in evidence. This line was pursued in the Claimant's submissions. Yet, it was not the

Claimant's case as per his pleadings that the disciplinary session was improperly conducted. In his pleadings, he seems to focus his attack on the failure by the Respondent to process his appeal as the main ground for his complaint. I do not think that it was open to the parties to prosecute their case beyond the boundaries set by their pleadings.

35. I have considered the record against the requirements of section 41 of the Employment Act in respect of the disciplinary session up to 30th October 2014. I find the session substantially compliant with the law and the Respondent's internal procedural requirements as exhibited the excerpts filed by the Claimant in his list of documents. In the premises, I hold that the Respondent processed the Claimant's disciplinary case before appeal in line with due process as stipulated under its internal procedures and the Employment Act.

36. Issue number three (3) relates to the Claimant's appeal against the decision to terminate him. According to the Claimant, he challenged the decision to terminate him by filing an appeal against it on 10th November 2014. That the appeal is deemed to have been lodged with the Respondent on 11th November 2014 when he sent a copy thereof by courier to the Respondent. The Claimant produced as exhibit EMS shipment waybill ticket number 0130334. The waybill exhibits the following: that it was sending a document from the Claimant to the Respondent; that the date for dispatch of the document was 11th November 2014; that the document was directed to the Chairman, Board of Directors of the Respondent.

37. It is however impossible to tell by looking at the waybill ticket what it is that was being dispatched to the Respondent. This is because no copy of the forwarding letter for the document that was sent was produced by the Claimant. Further, it is not possible to tell from the waybill whether and or when the document was received by the Respondent if at all. Indeed, during cross examination, the Claimant appeared to concede that if the Respondent contends that it did not receive the appeal, it is possible that this could be true.

38. The Respondent has consistently denied receiving the appeal that the Respondent asserts that he sent on 11th November 2014. The question whether the appeal was received by the Respondent then becomes an issue for determination. This can only be resolved by reference to the evidence tendered by the parties on the issue. And since it is the Claimant who asserts that he sent the appeal, the burden lies with him to prove that he did sent the appeal and that it was delivered to the Respondent.

39. From the ruling delivered by this court on the preliminary objection on 1st November 2019 (differently constituted), the Claimant was held to have received the Respondent's letter of dismissal dated 30th October 2014 on 10th November 2014 when it was delivered to him. Both parties agree that the Claimant had the right to appeal against this decision. This right is allegedly provided for under clause 13.16 of the Human Resource Manual of the Respondent.

40. The parties only filed sections of this manual leaving out other relevant portions. For instance, the sections prescribing the time within which appeals may be filed were left out. However, both parties seem to agree that the manual requires that appeals be filed within 14 days from the date of communication of the impugned decision. In this case the date of communication of the dismissal was declared by the court to have been 10th November 2014. Accordingly, the Claimant had up to 24th November 2014 to lodge his appeal.

41. The critical question for purposes of determining whether the appeal was filed is to determine if and when it was received by the Respondent. This position is aided by the provisions of section 3 (5) of the Interpretation and General Provisions Act which provides as follows: -

> ***''Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.''***

42. While this provision does not directly cover the scenario in the current case because no law or regulation that required the Claimant to serve the appeal by post was cited by the parties, it nevertheless is the only reasonable guide from which the court can borrow and apply mutatis mutandis. From the section, it is clear that unless a contrary intention appears, the date of service of a document sent by post is the date the document is delivered in the ordinary course business.

43. To establish the fact that the Claimant lodged his appeal with the Respondent within the 14 days that the parties agree was the time prescribed by the manual, he had to demonstrate not just that he sent the appeal but that it was received and when it was received. This is because the date of receipt of a document is deemed as the date of lodging it. Unfortunately, no such evidence was laid before the court.

44. As has been indicated above, the evidential burden of proof on this aspect lay with the Claimant in terms of section 109 of the Evidence Act. In my view, it was necessary for the Claimant not merely to rely on the fact of dispatch as proving this issue. As receipt of the appeal was expressly disputed by the Respondent, the Claimant had to do more by say calling the courier service provider to demonstrate that it delivered the document to the Respondent on a particular date. This evidence would ordinarily be with the courier service provider.

45. As matters stand, there is no independent evidence of what was posted on 11th November 2014. Further there is no evidence that if indeed what was dispatched on 11th November 2014 was the Claimant's appeal, that it was received and if it was, when it was received. Therefore, it is impossible on the material before the court, to hold that the Claimant lodged an appeal against the decision of 30th October 2014 within the prescribed 14 days.

46. I will therefore agree with the Respondent that in the absence of proof of delivery of the appeal to the Respondent there is no evidence that the Claimant ever lodged with the Respondent the alleged appeal challenging the dismissal communicated through the letter of 30th October 2014. Accordingly in the absence of proof of delivery of the appeal, it is not possible for the court to find that the Respondent failed

to process the Claimant's appeal in violation of its internal procedures and the law.

47. To conclude on this matter, I wish to refer to two decisions that have helpfully guided me in reaching my conclusion that it was necessary for the Claimant to provide evidence on when the appeal was received by the Respondent in order for the court to determine whether the appeal was lodged on time. And that the date of receipt of the appeal as opposed to the date it was posted is the date the appeal is deemed to have been lodged with the Respondent.

48. In ***Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] eKLR***, the dispute related to whether the aggrieved applicant in the tender process had lodged its request for review (objection to the award) of the impugned tender within 14 days, the time prescribed by law. The procuring entity sent the Applicant its decision rejecting the applicant's tender by post on 4th August 2017. The Applicant received notification from the postal service provider of the presence of the procuring entity's aforesaid letter on 14th August 2017.

49. The procuring entity argued that it communicated the decision rejecting the applicant's tender on 4th August 2017 when it posted to the applicant its decision vide its letter dated 2nd August 2017. In the procuring entity's view, the date of receipt by the applicant of its letter aforesaid was 4th August 2017, the date of its postage. Therefore, the 14 days available to the applicant to seek review/object to the award ran out on 17th August 2017.

50. Dismissing this view, the court held that the date of notification to the applicant of the rejection of the tender by the procuring entity was the date of receipt of the letter by the applicant and not the date of its postage. Therefore, time for lodging objections begun running on 14th August 2017 and not 4th August 2017.

51. In ***John Francis Muyodi v Peter Lunani Ongoma & 2 others [2014] eKLR*** the court observed as follows in relation to the date of service of a Notice of Appeal sent to a party through registered post: -

> ***'' In this case, there is evidence from paragraph 4 of Daniel Ndaba's affidavit in support of this application that on 12thJuly, 2013, the applicant's advocates received the notice of appeal that the respondent had posted on 10th July, 2013. That confirms the respondent's assertion that posted documents were received within two days. That being the case, the issue we should now resolve is when the appellant's advocates are deemed to have received the record of appeal to determine whether or not the present application is incompetent for having been filed out of time.***
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> ***The appellant admittedly filed the record of appeal on 2ndOctober, 2013. He averred in his replying affidavit that he sent by registered post copies thereof to all the respondents on the following day, that is on 3rdOctober, 2013. As proof of that, he annexed to his replying affidavit three copies of certificates of posting showing that on that day, he indeed sent documents to the advocates for the respondents in this appeal, M/s Dally & Figgis Advocates, M/s Sila Munyao & Co Advocates and M/s Magare & Co Advocates. It cannot therefore be correct that the applicant's advocates received a copy of the record of appeal 12 days later when it had been posted on 3rdOctober, 2013.***
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> ***In the circumstances, we find and hold that the applicant's advocates received the record of appeal on or before 6thOctober, 2013.''***

52. These decisions help in determining the fact that the date of service/notification of a document that has been delivered by post is not the date it was posted. Rather, it is the date it was received. In my view, this argument applies to documents dispatched by courier as well.

53. This brings me to issue number four (4) on whether the Claimant is entitled to the reliefs sought in the claim. Since I have found that the Claimant was absent from duty without permission and without lawful cause and since I have held that the Respondent observed procedure when processing the disciplinary case against the Claimant and there was no valid appeal against the decision of the disciplinary committee, I think that the Claimant cannot be granted the reliefs he sought. I will therefore dismiss this suit with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF FEBRUARY, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

Gitonga for the Respondent

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall

be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE