



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2500 OF 2017**

**ANDREW CORNEL ATHEMBO.....CLAIMANT**

**VERSUS**

**CARLCARE SERVICES LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant avers vide his memorandum of claim that he was initially employed by the respondent on contractual basis, as an accountant with effect from 15<sup>th</sup> April, 2016. That the employment relationship was later formalized on 1<sup>st</sup> January, 2017 vide a contract of employment, which also altered his designation from that of an accountant to Financial Assistant. The claimant avers that his grievance against the respondent commenced when sometimes in March, 2017, he was causally informed by his then supervisor by the name, Ms. Ci Song, that his services were no longer required. That subsequently, throughout the month of April 2017, he was denied access to the respondent's premises by the security guards, who informed him that he was no longer an employee of the respondent.

2. It is against this background that the claimant moved the court vide the instant claim, through which he seeks reliefs in the nature of a declaratory order to the effect that his termination was unlawful and unfair; compensatory damages for unlawful termination; salary for the remainder period of his contract; salary arrears for the period he was on compassionate leave; salary arrears for the period he was on sick leave; general; and exemplary damages.

3. The respondent denied the claimant's assertions that he was unfairly and unlawfully terminated. In its defence, it stated that the claimant's termination was for a lawful cause as it was on the basis of reporting to work late, failing to clock in and out of the respondent's identification biometric system contrary to the company's policies and failing to hand work reports on time as required. Consequently, the respondent asked the court to dismiss the claim with costs.

4. The matter proceeded for part hearing on 3<sup>rd</sup> November, 2021, when the claimant closed his case. The matter was then adjourned for defense hearing 16<sup>th</sup> December, 2021, whereupon the trial closed.

**Claimant's case**

5. At the commencement of the hearing, the claimant adopted his witness statement and bundle of documents to constitute part of his evidence in chief. The said documents were also produced as exhibits before court.

6. The claimant's testimony is that while in the employment of the respondent, he discharged his duties with diligence and single handedly refined its software, kept proper book of accounts and set up financial structures for reporting and compliance. That sometimes in March, 2017, he was verbally terminated by his then supervisor, Ms. Ci Song and thereafter barred from accessing the respondent's premises. That he was not given any formal termination letter or warning to that effect. It was his testimony that this was shortly after his father's burial. That he did not have any disciplinary issue at the time and was never issued with any show cause letter or notice in respect of his termination. That upon instructions, his advocates issued a demand letter to the respondent, but the same yielded no response hence the court action. He summed up his testimony by stating that his unexpected termination humiliated him, rendered him destitute and set him back financially. He asked the court to allow his claim as prayed.

**Respondent's case**

7. The respondent tendered oral evidence through Mr. Fredrick Kaloki, its Human Resource Business Partner, who testified as RW1. Mr. Kaloki adopted his witness statement and documents filed on behalf of the respondent, to constitute part of his evidence in chief.

8. Mr. Kaloki denied the assertions by the claimant that he was unlawfully terminated. It was his testimony that the claimant instigated his own termination by reporting to work late and being absent without permission. To this end, he referred the court to the biometric attendance report, pointing out that the same confirms the claimant's absence from 27<sup>th</sup> February, 2017 to 23<sup>rd</sup> March, 2017. That when asked to explain

his absence, the claimant stated that he had been unwell and promised to submit the sick sheet to that effect. That the claimant never reported back to work thereafter, as he was aware of an impending disciplinary action against him. It was his further testimony that the claimant was paid his terminal dues and issued with a Certificate of Service hence is not entitled to any of the reliefs he now seeks from court.

9. In cross examination, Mr. Kaloki admitted that the claimant was not taken through a disciplinary process as his absence from work, denied the respondent an opportunity to do so.

### **Submissions**

10. In support of his case, the claimant submitted that the respondent failed to consider all existing safeguards relating to procedural and substantive termination of employment as set out under the Employment Act. It was his further submission that the respondent failed to prove that there were reasons for his termination hence acted contrary to section 45 of the Employment Act. To fortify his submissions, the claimant invited the court to consider the authorities of **Anthony Mkala vs Malindi Water & Sewerage Co. Ltd, Industrial Cause No, 66 of 2012, Mary Chemweno vs Kenya Pipeline Limited, Joseph Sitati Nato vs Kenya Ports Authority (2010) EKLR, JSC vs Gladys Boss Shollei & another (2014) eKLR and Kenfreight (EA) Ltd vs Benson K. Nguti (2016) eKLR.**

11. At the time of writing this judgement, the respondent was yet to file its submissions hence the court did not have the benefit of considering the same.

### **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 falling for this court's determination are;

- i. Whether there was a justifiable reason to warrant the claimant's termination?**
- ii. Whether the respondent complied with the requirements of fair hearing?**
- iii. Is the claimant entitled to the reliefs sought?**

#### **Whether there was a justifiable reason to warrant termination?**

13. The guiding light in determining this issue is **Sections 43 (1) and 45 (2) (a) & (b)** of the Employment Act (Act). Under section 43(1), an employer has the burden of proving the reasons for termination and failure to do so, such termination is deemed to be unfair. Additionally, **section 45 (2) (a) and (b)** of the Act, provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

14. The claimant and the respondent have presented different versions as to how the employment relationship ended. On the one hand, the claimant avers that he was verbally terminated and denied access to his work premises, while the respondent states that the claimant absented himself from work without permission.

15. There is no letter of termination on record or any other correspondence for that fact, signifying the end of the employment relationship. As such, the real reason for the severance of the employment relationship cannot be deciphered. Nonetheless, an inference can be drawn from the evidence on record.

16. To support its assertion that the claimant absconded duty, the respondent presented a biometrics attendance register which indicates the claimant's absence on certain days, specifically from 27<sup>th</sup> February, 2017 until 15<sup>th</sup> March, 2017. Further the said biometrics attendance register, indicates the claimant did not clock in or out in on certain days.

17. The claimant disputed the accuracy of the information contained in the biometrics attendance register on the basis that it does not contain the respondent's stamp or letter head, hence is a mere excel sheet that is not owned. According to the claimant, the same is not an accurate reflection of the staff attendance, at the respondent company.

18. Despite this assertion, the claimant has not proved that he was at work on the days he is marked as absent by the said biometric attendance register. According to the claimant's testimony, he was verbally terminated by Ms. Ci Song sometimes in March, 2017 and throughout April, 2017, was not allowed access to the respondent's premises.

19. The claimant's assertion notwithstanding, the biometrics attendance register indicates that he was absent from work from 27<sup>th</sup> February, 2017 to 15<sup>th</sup> March, 2017. Thereafter, it shows that he resumed duty on 16<sup>th</sup> March, 2017 upto 23<sup>rd</sup> March, 2017. On his part, he did not prove that he was actually at work on the days he is indicated as absent by the biometrics attendance register.

20. In any event, the claimant testified that his termination came shortly after the burial of his father hence he was on compassionate leave. Indeed, he has prayed for salary arrears during the period he claims to have been on compassionate leave. Further, in cross examination, he stated that he was on sick leave and the respondent had his record to that effect. As a matter of fact, he has also prayed for salary arrears during for the period he says he was on sick leave.

21. It is notable that the claimant did not indicate the specific dates he says he was on compassionate leave and sick leave. It is therefore not

clear whether it is on the days, he is cited as having been absent as per the biometrics attendance register.

22. The foregoing notwithstanding, in the event the claimant was on compassionate leave, he has not produced evidence to prove that he applied for leave and was granted permission by the respondent to be away from work.

23. In terms of the provisions of clause 10 of the claimant's employment contract, he is entitled to 21 leave days in any calendar year. Reasonably, it was expected that in the event he needed time off to attend to his father's funeral arrangements, that he would have applied for leave appropriately. As it is, there is no evidence on record to show that the claimant applied for leave to be away on compassionate grounds and that the same was granted.

24. It is not enough for him to assert that the respondent was aware of his bereavement as some of its staff attended his father's funeral. Either way, he needed to regularize his absence from work by applying for leave as required.

25. Similarly, there is no evidence that the claimant applied for sick leave as required by his employment contract. Clause 11.1 of the employment contract entitles the claimant to 30 days sick leave with full pay, subject to production of a certificate of incapacity.

26. Further, Clause 11.4 requires an employee to report any absence in the event of illness. It provides as follow;

**“It is essential that you follow the absence reporting procedure otherwise your absence may be deemed to be unauthorized for which you may not be paid and for which disciplinary action may be taken.**

27. It was therefore the claimant's duty to notify the respondent of his illness and apply for leave as required under the said clause 11.4. As it is, there is no evidence that he complied with said contractual provision hence was at fault.

28. Coupled with the foregoing, the claimant did not adduce any evidence in the form of a sick sheet or a medical report from a certified medical practitioner, to prove that he was unwell at the time he is alleged to have been absent from work.

29. Since it is the claimant that was in need of leave, either on grounds of ill-health or for compassionate reasons, it was incumbent upon him to make an appropriate application to the respondent. It was also his duty to make the respondent as his employer, aware of the reason why he was absent from work. There is no evidence he did so.

30. These gaps in the claimant's case lends credence to the respondent's assertions that he was absent from duty without permission.

31. Ultimately, since the claimant failed to apply for the appropriate leave and notify the respondent of his whereabouts, he availed it the grounds and cause to take disciplinary action against him for desertion of duty.

32. In the circumstances, I find that the respondent had justifiable cause to terminate the claimant's employment on account of abscondment of duty, noting that the same is a ground for dismissal under section 44 (4) (a) of the Employment Act.

33. Having found as such, I now turn to determine whether the respondent subjected the claimant to a fair process prior to termination.

#### **Whether the claimant was subjected to a fair process**

34. The requirement of fair hearing is provided for under **sections 45 (2)(c) and 41 of the Employment Act**. In this respect, an employer is required to notify an employee of the reasons it is considering terminating his or her 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.

35. In the instant case, it is the claimant's case that he was neither issued with any notification of the allegations against him, nor was he given an opportunity to respond or answer to such allegations.

36. In its defence, the respondent stated that the claimant's absence from work made it impracticable for him to be granted a fair hearing.

37. The Court of Appeal in the case of the **Postal Corporation of Kenya vs Andrew K. Tanui [2019] eKLR**, noted that the requirements of fair hearing as stipulated under section 41 of the Employment Act are mandatory in nature and constituted the minimum standards an employer is required to comply with. The Court reckoned thus;

**“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for**

**"Notification and hearing before termination on grounds of misconduct" in the following manner:- “(1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”**

**“(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee**

may on the grounds of misconduct or poor performance, and the person, chosen by the employee within subsection (1) make.” Section 42 (1) referred to in Sub-section (1) relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:- (i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”

38. I fully adopt and reiterate the findings of the Court of Appeal to the effect that the requirements of fair hearing are not optional hence it was not open for the respondent to overlook the same.

39. Despite citing the claimant for desertion/abscondment from duty, it never issued any notification asking him to show cause why disciplinary action should not be taken against him. It cannot hide behind the fact that the claimant was nowhere to be found hence could not be given an opportunity to be heard. The two parties were in an existing employment relationship hence there were established channels of communication through which the claimant could have been reached and asked to answer to the allegations regarding his absence.

40. As I have found herein, the respondent had all the reason and right as an employer to commence disciplinary action against the claimant for desertion from duty. However, it opted to fold its hands and let go off the claimant quietly.

41. Regardless of the claimant’s transgressions, the respondent was duty bound to comply with the legal requirements stipulated under section 41 of the Act. Hence, it was to notify 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.

42. The upshot of the foregoing is that although the respondent had justifiable cause to terminate the claimant from its employment on account of abscondment of duty, it did not comply with the statutory provisions as regards fair hearing. To that extent, the claimant’s termination was not lawful for want of procedure.

43. Having so found, what reliefs avail to the claimant?

**Reliefs**

44. 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 five (5) months’ gross salary as compensatory damages.

45. I would have awarded the claimant one month salary in lieu of notice but I note that he was paid the same together with his terminal dues.

46. The claim as regards salary arrears for the period he was on compassionate leave and sick leave are denied for reasons stated elsewhere in this Judgment.

47. The claim for leave not taken is similarly declined as it was not particularized.

**Conclusion**

48. In the final analysis, I enter judgment in favour of the claimant against the respondent for the sum of **Kshs 175,000/=** being compensatory damages for unlawful termination.

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

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

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.**

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**STELLA RUTTO**

**JUDGE**

**APPEARANCE:**

**FOR CLAIMANT MR. ALOO**

**FOR THE RESPONDENT MR. OCHOLA**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**