



**Shisumu v Agriculture, Fisheries and Food Authority (Cause
1 of 2017) [2022] KEELRC 1225 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 1 OF 2017
JW KELI, J
APRIL 28, 2022**

BETWEEN

VINCENT AFWAYI SHISUMU CLAIMANT

AND

AGRICULTURE, FISHERIES AND FOOD AUTHORITY RESPONDENT

JUDGMENT

1. The claimant upon dismissal from employment on basis of absconding duty filed Memorandum of claim dated November 21, 2016 seeking the following reliefs:-
 - a. Reinstatement
 - b. Payment of damages/benefits
 - c. Costs
 - d. Interest.
2. The claimant together with the claim filed list of documents dated November 21, 2016, list of witnesses and claimant's statement of November 21, 2016, and filed a bundle of documents.
3. The respondent entered appearance and appointed J.B Otsiula & Associates Advocates to represent it. The respondent filed response dated 22nd December 2017 together with respondent's witness statement dated May 14, 2018 and respondent's list of documents dated May 14, 2018 and the bundle of documents. The respondent filed an amended list of documents to add a copy of letter dated June 2, 2015 addressed to the claimant.
4. The claimant filed a request for documents dated January 15, 2019.
5. The claimant filed a further undated list of documents received in court on the May 23, 2019.



6. The respondent filed a further list documents dated June 6, 2019.

The Claimant's Case

7. In brief the claimant's case is that he was dismissed from work on November 18, 2015 on account of him being absent from duty without permission for a total of 110 days which he denies and that his appeal was dismissed on January 15, 2016. He says the allegation was based on a fictitious attendance register, he was not issued with a warning letter previously and had a good record of performance. He claims reinstatement and payment of damages.
8. The claimant was only witness of his case, gave evidence on oath and adopted his statement dated November 21, 2010 as his evidence in chief. The Claimant told the court that he was not currently working, that he was employed by the respondent in the year 2014 on 11th August and worked upto November 2015. That his title was Horticultural Assistant in the Technical Department. He was cross-examined on his evidence and closed his case.

The defence Case

9. The respondent states that the claimant did not account for all the 110 days he was said to have absconded duty and had on July 22, 2016 been issued with a letter by immediate supervisor cautioning him of absence, that the claimant had not signed attendance register, failed to give new evidence on appeal to warrant second hearing and his actions were in breach of section 44 of the [Employment Act](#) warranting summary dismissal done after according him hearing.
10. Defence called one witness of fact Bernard Amadi who gave sworn evidence as Deputy Director Labour & Welfare of respondent. DW adopted this witness statement dated May 14, 2018 as his evidence in chief. DW produced respondent's list of documents dated May 14, 2018 and amended July 20, 2018 as respondent's evidence and a further list of documents dated June 6, 2019 both produced as exhibits 1-7 & 8-13. DW was cross examined by claimant's Counsel and defence closed.
11. Parties filed written submissions. The claimant's are dated February 1, 2022 drawn by E. A Wilunda & Co. Advocates and filed in court on the 3rd February 2022. The Respondent filed written submissions dated 1st February 2022 drawn by J.B Otsiula & Associates Advocates and filed in court on the February 4, 2022.

Determination

Issues for determination

12. The claimant identified the following as the issues for determination .
- a. Whether the respondent's actions amounted to unfair, unlawful and wrongful termination of claimant's services.
 - b. Whether the claimant is entitled to costs.
- The respondent identified the following issues for determination:-
- a. Whether the honourable court should reinstate the claimant.
 - b. Whether the honourable court should order for payment of damages/Benefits.
 - c. Whether the dismissal was lawful.



13. The court having considered the issues addressed by the parties and the case is of the considered opinion that the issues placed before the court and for conclusive determination of the case as follows:-
 - a. Whether the dismissal of the claimant from employment was lawful and fair.
 - b. Whether the claimant is entitled to reliefs sought.
 - a. Whether the dismissal of the claimant from employment was lawful and fair.
14. The claimant submits that before being called for disciplinary hearing he was not given a warning and that after the hearing he was recommended to be transferred which he took as final decision on the disciplinary but the Respondent chose instead to dismiss him from service. The claimant denied the existence of attendance list at his station of work.
15. The genesis of the dismissal is the show cause letter dated August 21, 2015 (Claimant’s exhibit 1) that required the claimant to show cause why disciplinary action should not be taken against him for being absent from duty for 110 tabulated days on ground that the absence amounted to Gross misconduct and breach of the Human Resource Manual for Staff Clause 11-15 (ii) and Clause 44 (a) of the Employment Act. The claimant had 7 days to respond.
16. The Claimant responded to the show cause letter dated 27th August 2015 and denied the allegation of absence and disputed the evidence relied on by the Respondent.
17. On record is a letter by Respondent’s interim head of Directorate Zakayo Magara addressed to the interim Director General on the absence of Claimant from work and a warning letter to Ms Soita, his supervisor, dated October 30, 2015 for failure to report the absence of claimant from work, and a letter dated 22nd June 2015 by Ms Soita addressed to claimant on absence from work.
18. It is not in dispute that there was a disciplinary hearing. The respondent by a letter dated October 28, 2015 wrote to their interim head of Human Resource about the claimant as follows:-

“Following the AFFA staff disciplinary Committee meeting held on October 27, 2015, the Committee recommended the transfer of the above mentioned officer (claimant) . The purpose of this letter is to inform you that the officer can be transferred from HCD Bungoma station to HCD Kimilili Depot”.

The letter is by Zakayo Magara, Interim Head of Directorate.

The claimant states he had legitimate expectation of transfer as the final decision but was not transferred.
19. The respondent produced the letter of dismissal of claimant from employment dated November 18, 2015. The letter refers to the appearance at disciplinary Committee of October 27, 2015 on allegation of absence and states that the Authority having heard claimant in person noting he had waived his right to appear in the presence of his appointed witnesses, having considered submissions both in writing found that the claimant was guilty of absence for unaccounted days and tabulated the dates. He was dismissed from service for absconding. The claimant received and signed for the dismissal letter.
20. The court considered the claimant’s letter of appeal and finds it did not address the specific unaccounted days of absence but stated he did his work well. The respondent relied on a register of attendance by staff based at HCD Bungoma and which the claimant had not signed. He says it was forged but at the hearing he had no evidence of forgery.



21. On a balance of probability having considered all evidence before it, by the parties, the court finds that the Respondent complied with procedural fairness under section 41 and 45 of the Employment Act as reasons for dismissal were justified and there was a hearing before dismissal on same grounds. On the question of legitimate expectation that the Committee recommended for transfer after the disciplinary hearing was final, the court finds that the recommendations of a committee are only persuasive and the Authority as employer had final say and was within employer's right to terminate the services of the claimant on the ground of absence from work. From the foregoing, I find and determine that the claimant dismissal from employment was fair and lawful.
- b. Whether the claimant is entitled to reliefs sought.
22. The court having found the dismissal from employment to have been lawful and fair the claimant is not entitled to any of the reliefs sought. The court has taken note of the authorities cited and annexed by the parties in their submissions. The authorities address remedies of reinstatement and compensation hence not applicable the court having found that the dismissal of the claimant from employment by the Respondent was fair and lawful.

Conclusion and Dispositions

23. The claimants claim dated November 21, 2016 is 'held to be without merit and is dismissed.
Each party to meet its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF APRIL, 2022

**J. W KELL,
JUDGE.**

In the Presence of:-

COURT ASSISTANT: BRENDA WESONGA

CLAIMANT: Jeremiah Akhonya h/b Wilunda

RESPONDENT:- Absent

