



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**ELRC APPEAL NO E006 OF 2021**

**AYUB KOMBE ZIRO.....APPELLANT**

**VERSUS**

**UMOJA RUBBER PRODUCTS LIMITED.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the judgment of the Honourable Mr. J M Kituku,***

***Senior Principal Magistrate at Kilifi made on 8<sup>th</sup> day of July 2021***

***in Kilifi SPMCC ELRC Cause No. 104 of 2020)***

**Introduction**

1. This appeal arises from the decision of the trial court dismissing a number of the Appellant's prayers for compensation for alleged wrongful termination against the Respondent. Despite the dismissal of a substantial portion of the Claim, the court granted part of it relating to the issuance of a Certificate of Service under section 51 of the Employment Act.

2. Dissatisfied with the decision, the Appellant has appealed against the whole of it. He seeks to have the entire decision set aside and in place thereof this court to make appropriate orders in respect of the Claim.

**The Evidence**

3. From the record, it is not in dispute that the Respondent engaged the services of the Appellant as a machine operator. At some point between the months of August and September 2019, the Appellant states that he was diagnosed with tuberculosis. This prompted him to visit the Respondent's medical facility where after preliminary review, the medical officer in charge suggested that the Appellant be examined further since he was exhibiting signs of the disease.

4. Based on the Appellant's word and the preliminary investigation by the Respondent's medical officer, it was recommended that the Appellant stays away from work as he sought a medical doctor's opinion on the matter. The record shows that the Appellant was required to avail to the Respondent a doctor's certificate confirming that he indeed was suffering from tuberculosis to enable the Respondent process his sick leave and confirm the two months break that the Appellant was to take to enable him receive treatment.

5. It is also not disputed that after these preliminary steps, the Appellant left his workstation to start the treatment and certification process. However, there is no evidence that he subsequently procured the doctor's certificate to confirm that he indeed had contracted tuberculosis. Consequently, the Respondent did not process the Appellant's sick leave in terms of section 30 of the Employment Act.

6. It is also clear from the record that the Appellant resumed duty sometime in December 2019. However, there is no evidence that before resuming, he procured medical evidence to demonstrate that he was fully recovered if at all.

7. The record shows that as a result of this development, there was disagreement between the parties. According to the Respondent's witness, when it was realized that the Appellant had resumed work without presenting a clean bill of health to the Respondent's Human Resource office (HR Office), he was asked to report to the HR office to resolve the issue. Instead of complying with the directive, the Appellant is said to have left the workstation. According to the Respondent, the next time its officers heard from the Appellant is when he served them with summons to enter appearance in the Claim before the trial court.

8. Proceeding on this premise, it is the Respondent's case that it did not terminate the Appellant's contract. In the Respondent's view, the Appellant left employment of his own volition.

9. On his part the Appellant stated that when the Respondent's management realized he had resumed duty, they asked him to go back home which he did. According to the Appellant, this action by the Respondent's management constituted a dismissal of the Appellant by the Respondent. And hence the case before the trial court.

10. After hearing the case, the trial court found the Appellant's claim as largely wanting. He dismissed it save for the prayer relating to the issuance of a Certificate of Service under section 51 of the Employment Act. It is this finding that has triggered the current appeal.

### **Grounds of Appeal and Issues for Determination**

11. In the appeal, the Appellant raises several grounds of appeal. These are more particularly set out in the Memorandum of Appeal appearing at pages 1 to 2 of the Record of Appeal. I will however consider them under the following broad subheadings:-

*a) Whether the trial court erred in law and fact in holding that the Respondent had asked the Appellant to furnish the Respondent with a Certificate under section 30 of the Employment Act despite absence of documentary evidence of such request.*

*b) Whether the learned trial magistrate erred in law and fact in holding that the Respondent never terminated the Appellant.*

*c) Whether the trial court was justified in law and fact in holding that the Appellant was not entitled to salary for the duration he was away for two months from close of September 2019.*

*d) Whether the failure by the Respondent to call as a witness the person who asked the Respondent to report to the Respondent's HR Office on 19<sup>th</sup> December 2019 was fatal to the Respondent's case.*

*e) Whether the trial court erred in law and fact in failing to appreciate that despite the Appellant's absence from the workplace, his contract of employment could not be deemed as having terminated on account of absconding duty in the absence of disciplinary action being taken against the Appellant by the Respondent so as to justify termination through abandonment of employment.*

*f) Whether the trial court erred in fact and law in failing to enter judgment in favour of the Appellant in respect of the claims for service pay and underpayments.*

### **Analysis**

12. When the appeal came up for directions, the parties agreed to have it heard through written submissions. Subsequently, the submissions were placed on record. In this decision, I have considered both the record and submissions as filed.

13. I am alive to the fact that this is a first appeal. Accordingly, I will keep in mind my duty to re-evaluate the evidence on record and reach my own conclusions on the dispute. However, even as I do the foresaid, I must keep in mind the fact that I neither saw nor heard the witnesses in the cause testify and must therefore give due consideration for this fact.

14. The first (1<sup>st</sup>) issue for consideration is whether the trial court erred in fact and law in holding that the Respondent had established that it asked the Appellant to furnish it with a medical certificate under section 30 of the Employment Act in the absence of documentary evidence in support of such request.

15. It is clear from the evidence on record that the Appellant left employment in the first instance around September 2019 when he was suspected of having contracted tuberculosis. Upon his own indication to the Respondent's clinical officer that he had this infection, it was recommended that the Appellant does the following: -

***a) He takes a break from work for two months to seek medication.***

***b) Meanwhile, he gets examined by a doctor to ascertain that he indeed had contracted tuberculosis.***

***c) He provides the doctor's certificate confirming that he was suffering from the disease to enable the Respondent process sick leave for him and also formally approve the decision to have the Appellant stay away from work for two months as he received medication.***

16. I do not understand the Respondent's clinical officer as having certified the Appellant as suffering from tuberculosis. The officer only made preliminary observations of the likelihood of the Appellant having contracted the ailment based on his casual observation and the Appellant's own word. Therefore, it was necessary for the Appellant to have the infection confirmed by a doctor in terms of section 30 of the Employment Act.

17. A reading of section 30 of the Employment Act implies that the duty to procure the certificate regarding an employee's medical condition lies with the employee. It does not lie with the employer.

18. In this appeal, the Appellant has disputed the fact that the Respondent asked him to procure the certificate merely because there is no

documentary record of that request. I do not think that this position by the Respondent is defensible for a number of reasons. First, nowhere under section 30 of the Act is it indicated that it is the obligation of the employer to ask the employee to provide this certificate. As I have said, the duty to supply the certificate lies with the employee. Second, there is no indication in law that even if it was the employer's duty to call for the certificate that this must be done in writing.

19. The foresaid notwithstanding, there is evidence that the Respondent asked the Appellant to undergo medical review and avail the doctor's certificate in order for the Respondent to process the Appellant's sick leave. Further, the Respondent's witness testified that the Appellant was to provide proof of recovery before resumption of duty.

20. These facts are specifically pleaded in the statement of defence by the Respondent and supported by the written and oral evidence of the Respondent's witness. It is noteworthy that the Appellant did not join issue with the defence by way of a reply to defence on these averments. In law, the Appellant is deemed to have admitted these facts.

21. In my view, the Appellant's reaction to the issue of procurement of the medical certificate under section 30 of the Employment Act has been less than candid throughout the proceedings. To say the least, he has flip-flopped on the matter throughout the conduct of his case. For example, even though in his grounds of appeal he insinuates that the Respondent never asked him to procure the certificate, in his evidence before the trial court he stated that he furnished the Respondent with it. Nevertheless, it is clear from the record that he did not provide evidence to demonstrate that he in fact handed in the said certificate. Further, the record does not disclose that he ever provided evidence of recovery before he resumed duty. Consequently, the trial magistrate's finding on the fact that the Appellant was asked but failed to avail these documents cannot be faulted.

22. The second (2<sup>nd</sup>) issue relates to whether the learned trial magistrate erred in law and fact in holding that the Appellant never terminated the Respondent. The Respondent's evidence is that the Appellant left the workplace on 19<sup>th</sup> December 2019 when he was asked to report to the Respondent's Human Resource office to explain why he had resumed duty without availing medical evidence on his health status. However, the Appellant argues that he did not leave the workplace of his own volition. That he was asked by the Respondent's management to go back home.

23. Whichever way one looks at it, there is no evidence of the Respondent having terminated the Appellant on the material date or later on in time. The fact that the Respondent asked the Appellant to go home for failure to provide a clean bill of health cannot, in the context of this case, be construed as a termination of the contract of employment by the Respondent. Understood from the viewpoint of the fact that it was part of the initial agreement between the parties that as a condition for resumption of duty the Appellant will provide evidence of being free of the disease, the Respondent's insistence on this evidence before the Appellant settled at the workplace cannot be faulted.

24. The record shows that the Respondent had over 3000 employees at the time. It is also not contested that tuberculosis is contagious. Therefore, the Respondent's immediate reaction to require the Appellant to separate from the rest of the staff in the face of absence of evidence of full recovery appears to me to have been reasonable in the circumstances. It cannot be turned round to imply a decision by the Respondent to terminate the Appellant.

25. After leaving the workplace, the Appellant instituted the claim before the trial court pleading unfair dismissal. Yet, there is no evidence of the Respondent having issued him with a termination. From the record, all that the Respondent did was to require the Appellant to avail proof of full recovery before resumption of work.

26. In my view, the trial court's finding on this issue is supported by the evidence on record. I do not see where the trial court erred in reaching the finding.

27. The third (3<sup>rd</sup>) issue relates to whether the trial court was justified in law and fact in holding that the Appellant was not entitled to salary for the duration he was away for two months from close of September 2019.

28. Section 30 of the Employment Act provides that an employee is entitled to full pay for seven (7) days while on sick off. Thereafter, he is entitled to draw half salary for another seven (7) days. This benefit is available only once in every twelve (12) consecutive months and applies to employees who have been in service for at least two (2) consecutive months prior to falling ill. The employer will only be obligated to pay more than this statutory minimum where the parties had contracted for better terms and conditions of service.

29. But even then, this benefit is only enjoyed where an employee has furnished the employer with a medical certificate by a doctor confirming inability to work out of sickness. Where the certificate is not available, the right is lost. The submission by counsel for the Appellant that there is no time frame within which to submit the certificate is, in my view incorrect since the processing of sick leave is conditional upon the employee submitting the certificate.

30. In the current case the Appellant did not procure the medical certificate required under section 30 of the Employment Act to enable him claim sick leave with pay. How was the Respondent to justify the issuance of sick leave to the Appellant without proof of his sickness? And how was the Respondent to pay the Appellant for the duration he was away in the absence of a medical certificate justifying his absence?

31. These are the matters that the trial court considered (in my view rightly) before returning a verdict that the Appellant was not entitled to claim salary for the duration he was away from work after August 2019. I see no misapprehension of evidence and or the law by the trial court in this respect.

32. The fourth (4<sup>th</sup>) issue relates to whether the failure by the Respondent to call as a witness the person who asked the Respondent to report to the Respondent's HR Office on 19<sup>th</sup> December 2019 was fatal to the Respondent's case. In my view, whether this person had been called as a witness would have made no difference to the final decision in the cause. I say so because as I have mentioned in the judgment, the

events of 19<sup>th</sup> December 2019 did not in any event result in termination of the Appellant from employment. It does not therefore matter that the said individual was not called.

33. In any event and as is submitted by the Respondent's counsel, the question of which witnesses a party elects to call in support of his case in civil matters is really not of concern to the court as long as credible evidence is presented in support of a contested fact. This principle is reiterated in ***Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR***.

34. The principle that a court may draw an inference on the adversity of evidence withheld by a witness is of more relevance to criminal trials than it is to civil matters. This is because in a criminal trial, the state has a duty to present all evidence in its possession and which is relevant irrespective of whether it supports the case of the accused person. Thus, withholding of any evidence inevitably leads to an inference of adversity against the prosecution. Conversely, in civil matters where parties have the latitude to determine the evidence to call as long as it is relevant, the principle may not find much relevance and application.

35. The fifth (5<sup>th</sup>) issue is whether the trial court erred in law and fact in failing to appreciate that despite the Appellant's absence from the workplace, his contract of employment could not be deemed as having terminated on account of absconding duty in the absence of disciplinary action being taken against the Appellant by the Respondent so as to justify termination by way of abandonment of employment.

36. I have looked at the trial court's determination on this issue. Whilst the court rightly observed that the Respondent did not terminate the Appellant's employment, it nonetheless failed to make a definitive pronouncement on whether the contract had terminated as a matter of law. Despite this failure, the court went ahead to make some awards which imply that it was working on the assumption (without a positive finding) that the contract had terminated. An example of such award is the order that the Respondent issues the Appellant with a certificate of service evidencing closure of the employer-employee relationship between the parties.

37. The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

38. It is desirable that upon realizing that an employee is no longer reporting at work the employer should formally require the employee to resume duty immediately and warn such employee of the risk of disciplinary action if he fails to. If the employee persists in his absence, it is desirable that the employer issues the employee with a formal notice to justify why he should not be terminated for unsanctioned absenteeism.

39. Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In ***James Okeyo v Maskant Flower Limited [2015] eKLR***, the court observed as follows on the issue: -

***".....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party."***

40. It is up to the employee to show up to explain his absence from duty. It is possible that he may have been prevented from reporting on duty for justifiable reasons such as incapacitating sickness or natural calamities.

41. If the employee: fails to resume duty or respond to the notice to show cause; or is not traced by the employer despite diligent effort; or responds to the employer but the reasons for his absence are considered unjustifiable, then the employer may proceed to terminate such employee for unauthorized absenteeism. These principles are well articulated in a series of decisions by this court including ***Joseph Nzioka v Smart Coatings Limited [2017] eKLR*** and ***Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services [2021] eKLR***.

42. The essence of this procedure is to ensure that the employee is terminated in a manner that meets the requirements of section 41 of the Employment Act as read with articles 41 and 47 of the Constitution. It must be demonstrated that the employer had a justifiable ground to terminate the employee and that he accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination.

43. The implication of the foregoing is that absent evidence that the Respondent followed the procedure aforesaid in handling the Appellant's absenteeism the Respondent cannot lawfully plead abandonment of employment by the Appellant as a way of closure of the employer-employee relation between them.

44. I have scrutinized the court's pronouncement on this issue. To my mind, the court did not guide itself well on the principles applicable to the issue. As I have said earlier, there was no evidence tendered to demonstrate that the Respondent terminated the Appellant. What comes out from the record is that the Appellant left work on 19<sup>th</sup> December 2019 and did not report back. Whether the Appellant was asked to go back home because of absence of medical documents that would allow him to resume work or he voluntarily walked away is not very material in this regard. The fact of the matter is that either way this did not result in termination of the contract of employment between the parties.

45. And yet, the fact that the Appellant failed to resume duty after the 19<sup>th</sup> of December 2019 is not of itself evidence of termination either. As emphasized above, for absence of an employee from duty to constitute abandonment of the contract, the employer must demonstrate that he has addressed the matter either by instigating disciplinary action against the employee or making other deliberate effort to get the employee to resume duty to no avail.

46. In my view, the failure by the trial court to analyze this aspect of the evidence against the applicable law led to the court presuming in favour of termination of the Appellant's employment without evidence to cushion the presumption. This vitiated the trial court's judgment. Consequently, the decision is set aside on this ground.

47. The Respondent's Counsel raises a rather interesting point to argue that the Appellant's employment terminated by operation of law. In the Counsel's view, the failure by the Appellant to comply with the requirements of section 30 meant that the employment relationship between the parties terminated by law. In support of this position, Counsel for the Respondent relies on the decision in **Benard Omondi Kwambi v Bedi Investment Limited [2020] eKLR**. With respect, I do not see anything under section 30 of the Employment Act which implies that failure of an employee to supply the employer with a medical certificate has the consequence of terminating employment. I therefore will not rely on the decision to find that the contract of service between the parties herein automatically termination on account of this reason.

48. Issue number six (6) is whether the trial court erred in fact and law in failing to enter judgment in favour of the Appellant in respect of the claims for service pay and underpayments. In view of my findings on issue number five (5) that the Appellant's contract of employment was not, in law terminated, there would be no need to address issue number six.

### **Determination**

49. I do not understand the Respondent's case to be that the contract of employment between the parties is now closed by virtue of the Appellant having absconded duty. At least this is evident from the witness statement by the Respondent's witness when she says as follows of the matter: -

***".....and upon him serving us with a medical document that ensured that he was granted a clean bill of health by a medical practitioner, we would have gladly allowed him to resume work. I reiterate that this remains our position to date."***

50. I understand the above statement as indicating that the Respondent's position is that it has not terminated the Appellant. And that subject to complying with the legal requirement as to production of medical certificates in compliance with section 30 of the Employment Act, the Respondent is ready to allow the Appellant to resume duty.

51. As matters stand now, the employer-employee relationship between the parties still subsists. The Respondent must take steps to close the relation through invocation of its internal disciplinary procedures as shown in this judgment if it so desires.

52. I note that in both the claim before the trial court and in this appeal, the Appellant has, in addition to the specific reliefs sought, asked the court to grant any other remedy it deems appropriate.

53. Since the Respondent never processed the Appellant's case of absenteeism according to the procedure set out above and having regard to the fact that the Respondent had indicated willingness to have the Appellant resume duty if he produced the medical certificates under section 30 of the Employment Act, I think that this was a proper case for the trial court to have ordered the Respondent to permit the Appellant to resume his duties if he complied with the requirements of section 30 of the Employment Act.

54. Of course, this does not mean that the Respondent will thereby be prevented from taking disciplinary action against the Appellant for any perceived misconduct in the manner prescribed by law. Such action inevitably falls within the managerial powers of the employer as long as it is undertaken within the parameters of the law.

55. I will therefore set aside the orders of the trial court and replace them with the following orders: -

*a) That subject to the Appellant providing the Respondent with medical proof of having fully recovered from the tuberculosis disease within 14 days of this order, the Respondent do allow the Appellant to resume duty, the contract of service between the parties having been established to still be in force.*

*b) That as the Appellant occasioned the prevailing state of affairs by his failure to provide medical certificates relating to his medical condition, he is deemed as having been absent from duty without the permission of the Respondent. Accordingly, the Appellant is not entitled to claim back payment of salary or other benefits.*

*c) There will be no order as to costs.*

**DATED, SIGNED AND DELIVERED ON THE 4TH DAY OF APRIL, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

Katana for the Appellant

Munene 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 15<sup>th</sup> 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.**