



**Ikiugu v Wanja Gichura Wambugu t/a Wambugu & Company Advocates  
(Cause 887 of 2016) [2022] KEELRC 12757 (KLR) (4 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12757 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 887 OF 2016**

**M MBARŪ, J**

**APRIL 4, 2022**

**BETWEEN**

**SAMUEL MUTHOMI IKIUGU ..... CLAIMANT**

**AND**

**WANJA GICHURA WAMBUGU T/A WAMBUGU & COMPANY  
ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a male adult. The respondent is a female adult working for gain as an Advocate of the High Court of Kenya.
2. The claim is that the respondent employed the claimant as a litigation clerk, conveyancing and bank agent at I & M Bank earning a salary of Ksh 32,480 paid by cheque and Ksh 5,000 in cash. No employment contract was issued.
3. The claim is also that the claimant was granted leave from December 3, 2015 to December 11, 2015 to enable him undergo his wedding ceremony on December 5, 2015 and proceed on honeymoon.
4. The claimant resumed duty on December 14, 2015 from leave but the respondent directed him to stay away until December 17, 2015 for a discussion with him and on December 16, 2015 the claimant received an email from the respondent with a notice to show cause alleging that he had absconded duty without permission between July 23, 2015 to August 30, 2015 and from November 30, 2015 to December 14, 2015 and directed him to respond before close of business. The claimant responded and denied the allegations.
5. On December 17, 2015 the respondent dismissed the claimant from his employment and issued him with a cheque of Ksh 45, 927.80 without giving him any particulars and that his response as inadequate and unacceptable.



6. The claim is that the respondent was in breach of the employment contract on the grounds that save for the period of June 23, 2015 to July 9, 2015 and December 3, 2015 – December 1, 2015 he respondent for the 15 years failed to grant him annual leave as required by the law. the respondent failed to pay NSSF for a long period. The notice to show cause did not disclose the nature of disciplinary case and the due process and the reasons given for termination of employment were not fair. The allegation of absconding duty was not factual as the claimant was present on duty on all working days from July 23, 2015 to August 30, 2015 and November 30, 2015 to December 2, 2015.
7. The claimant had expressly been granted leave for the period of 2<sup>nd</sup> to December 11, 2015 contrary to the allegations in the notice to show cause letter.  
The claimant is seeking the following dues;
8.
  - a) Salary for December, 2015 Ksh 37,480;
  - b) Notice pay Ksh 37,480;
  - c) Compensation for loss of employment Ksh 449,760;
  - d) Unpaid leave for 4 years Ksh 524,720;
  - e) Unspent leave days for 2015 Ksh 2,498;
  - f) Service pay for 15 years Ksh 526,200; and
  - g) Costs.
9. The claimant testified that he was employed by the respondent and worked diligently and save for the normal Christmas break he did not take annual leave. The respondent alleged that he was absent from work on 30<sup>th</sup> July to August 10, 2015 which was not correct. He had travelled to India in June, 2015 to take his brother for treatment and in December, 2015 the respondent gave him leave to undergo his wedding when the respondent granted him express leave.  
It was verbal communication.
10. In response, the respondent's case is that the claimant was an employee but was not diligent in his duties as alleged. The claimant as not allowed to take any leave to be away from the office over the period of July/August 2015 and November/December 2015 and has no proof of having been given permission. The claimant is not entitled to the reliefs sought.
11. The response is also that the claims for NSSF and other statutory due were remitted to the respective agencies and all other entitlements under his contract of employment were duly paid to him when due.
12. Employment terminated lawfully for absenteeism from duty without permissions.
13. The claimant took annual leave from 12<sup>th</sup> December every month to 14<sup>th</sup> January the following year and had no justification in alleging otherwise. Dismissal from employment was justified and should be dismissed with costs.
14. Mrs Wambugu testified that the claimant was employed as a clerk from the year 2000 and worked well until July, 2015 when he disappeared from the office and being the only clerk it inconvenienced the law firm and clients. In November, 2015 the claimant again vanished and later she learnt that he was attending to his wedding without getting prior permission to be away from the office.



15. She issued the claimant with notice to show cause on December 16, 2015 and he responded without given details on the matters outlined. A meeting was held the next day and for failure to show good cause, she issued him with letter of summary dismissal.
16. Mrs Wambugu also testified that as a tradition, the respondent would close office from 10<sup>th</sup> and 12<sup>th</sup> December each year for the Christmas break until 14<sup>th</sup> of the following year during the Court Vacation. All employees took their annual leave.
17. The claimant was paid his salary for days worked and the claims made have no basis.  
Both parties filed written submissions. Determination
18. An employer is allowed to summarily dismiss an employee for being absent from duty pursuant to Section 44(4) (a) of the [Employment Act, 2007](#) (the Act). the safeguard to the employee is that the employer must issue notice and allow the employee to make representations in terms of Section 41(2) of the [Act](#).
19. The claimant testified that in June/July, 2015 he travelled to India in the company of his brother seeking medical attention.
20. There is no permission from the respondent allowing him to be absent from work for such period.
21. The claimant also testified that he got permission to attend his wedding and honeymoon from 2<sup>nd</sup> to December 11, 2015. No evidence of leave application or permissions allowing him to be away from work has been produced.
22. For this reasons of being absent from work without permission, the respondent issued the claimant with a notice to show cause dated December 16, 2015 to which the claimant replied and noted that;
 

That in my response to the said letter of my absent[absence] from duty has never been deliberate nor without full knowledge or permission from yourself, the office and the management had full knowledge of my whereabouts and I deny the durations quoted of myself being absent from duty. ...
23. The claimant was put to task to explain why he was absent from duty without permission. His response appreciates that his absence was never been deliberate and was with the full knowledge of the respond and that management had full knowledge of my whereabouts.
24. Under the law, an employee may be subject to summary dismissal if without the authorisation of the employer, absents himself from work in terms of Section 44(4)
25.
  - (a) of the [Employment Act, 2007](#) and for such time out of work, the employer has the right to deduct from his wages in respect of each day the employee is absent from work. See Section 19(1) (c) of the [Act](#);  
... an employer may deduct from the wages of his employee—  
...
  - (c) an amount not exceeding one day’s wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;



26. In the case of *Robert Adere Monari v Riley Services Limited* [2021] eKLR the court held that where an employee is absent from work without permission he must communicate any special circumstances requiring such absence as otherwise such deliberate action invites the employer to issue a notice to show cause to the employee to explain himself.
27. When an employee is absent from work without leave or valid reason, disciplinary action will be taken.
28. If indeed the respondent and management knew where the claimant was on the noted periods he was absent from duty, the necessity of the show cause notice would have been unnecessary. Instead of addressing the issue at hand, the claimant took the position that the respondent knew or ought to have known where he was while away from work.
29. As noted above, absence from duty without permission is a ground for summary dismissal. The claimant was invited to show cause why he was absent from work but chose to go on a tangent of his own. Such does not aid his case. Far from it. It only compromised his employment upon squandering the opportunity to defend himself and explain his whereabouts at a time he was required at work but was absent.
30. In this case, summary dismissal was justified. The claimant was issued with notice and failed to show good cause.
31. On the reliefs sought, the claimant admitted he as paid Ksh 47, 480 in December, 2015. Such well covered his wage for the month and cannot justify claiming over the same period.
32. Notice pay and compensation are remedies not available in a case where summary dismissal is found justified.
33. The response that from 10<sup>th</sup> to 12<sup>th</sup> December each year the respondent would close for the Christmas break/Court Vacation and open from 14<sup>th</sup> January the next year was not challenged in any material way. The claimant testified that over the Christmas holidays he would take time off. Such time off should be accounted for.
34. To claim for annual leave in the context that the claimant had time off work in December each year is to seek unjust enrichment.
35. The claim for unexhausted leave days in the year 2015 is on the basis that the claimant did not take his annual leave. Employment terminated on the grounds of the claimant being absent from work for periods of June 12, 2015 and 30<sup>th</sup> November to December 11, 2015. Such time off work was without permission.
36. The claimant received his wages for the entire period he remained absent from duty and including full pay for December, 2015 when he did not offer his labours to the respondent at all. Such fully compensated him.
37. Service pay is due in terms of Section 35 of the *Act* and where the employer has not paid dues to the statutory body. The respondent attached a Certificate of Compliance from the NSSF which is not challenged in any material way. As the custodian of work records, such certification of payment of statutory dues is primary evidence of compliance.
38. Accordingly, the claims herein are found without merit and are dismissed with costs to the respondent.

**DELIVERED IN COURT AT NAIROBI THIS 4<sup>TH</sup> DAY OF APRIL, 2022.**

**M. MBARŪ JUDGE**



**In the presence of:**

**Court Assistant: Okodoi**

..... **and** .....

