



**Sibwoga v Seneca East Africa Ltd (Cause 236 of 2016)  
[2022] KEELRC 1207 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1207 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 236 OF 2016**

**J RIKA, J**

**MAY 27, 2022**

**BETWEEN**

**LENEN ISOE SIBWOGA ..... CLAIMANT**

**AND**

**SENECA EAST AFRICA LTD ..... RESPONDENT**

**JUDGMENT**

1. In his Amended Statement of Claim, filed on January 31, 2019, the claimant states that he was employed by the respondent as a Driver, in November 2011.
2. He was paid a monthly salary of Kshs. 16,500.
3. He was involved in a road traffic accident, on or about October 30, 2013. He was allowed sick-leave from May 2, 2014, and reported back for duty on 10<sup>th</sup> June 2014.
4. He was advised by the Human Resource Manager to go back home and wait for further instructions. He, on August 18, 2014, received a letter dated June 7, 2014 from the respondent, alleging that the claimant had deserted duty. His contract was terminated. He was not heard.
5. NSSF contributions of Kshs 400 were deducted by the respondent every month, but not remitted.
6. The claimant prays for Judgment against the respondent for: -
  - a. Unpaid salary of 2 months at Kshs 33,000.
  - b. Notice of 1 month at Kshs 16,500.
  - c. Refund of N.S.S.F deductions at Kshs 10,800.
  - d. Compensation at Kshs 198,000.
  - e. General damages for unlawful termination.



- f. Costs.
  - g. Any other suitable remedy.
7. The respondent filed its Statement of response on June 15, 2016. It is the position of the respondent that the claimant was granted 4 days of sick leave, from 2<sup>nd</sup> to 6<sup>th</sup> June 2014. He did not resume on June 7, 2014 as instructed. He did not communicate his whereabouts. The respondent made efforts to trace the Claimant. He could not be traced, and was declared a deserter, on June 14, 2014. He was in good health and had recovered from the minor, soft tissue injuries sustained, in the accident. The accident was way back on October 30, 2013. The claimant declined to return respondent's property. The respondent prays the court to dismiss the Claim with costs.
  8. The claimant testified, as did respondent's Human Resource Manager Mercy Mbonareri, on November 23, 2021 when hearing closed. The dispute was last mentioned on January 28, 2022, when Parties confirmed filing and exchange of their Final Arguments.
  9. The claimant adopted his Witness Statement and Documents on record. His Witness Statement replicates the contents of his Amended Statement of Claim, as summarized above.
  10. Cross examined, he told the court that he did not have a letter of employment. The respondent deducted, but did not remit N.S.S.F contributions. He was told to go home by Mercy. He was not recalled. Sick leave was from May 2, 2014 to June 10, 2014. The claimant was not changing the dates he pleaded. The Respondent wrote alleging that the claimant had deserted. He did not desert. His phone was on throughout. He could not return his work uniform, because he had instructed his Lawyer to pursue the Claim. The demand letter is dated October 2, 2014, 4 months after the letter of alleged desertion. He retains the Respondent's tools of work. Redirected, the claimant emphasized that he did not desert. The N.S.S.F Statements are exhibited. He was not recalled or taken through a disciplinary hearing.
  11. Mercy Mbonareri similarly adopted her Witness Statement and Documents filed by the respondent. The claimant did not resume duty as instructed, on June 7, 2014. His calls went unanswered. He was sent the letter by the Operations Manager dated June 7, 2014. He acknowledged receipt, then disappeared. He did not clear. He did not have a disciplinary case, to warrant him appearing at the Human Resource Manager's office. The letter of desertion was signed by the Operations Manager. It was received by the claimant on August 18, 2014. The claimant did not respond. He will be paid his terminal dues once he has cleared with the Respondent.
  12. Cross-examined, Mercy told the court that she had been serving the respondent for about 10 years. The letter dated June 7, 2014 was posted to the claimant. He received it on June 8, 2014. He reported on August 18, 2014 acknowledged receipt of the letter and disappeared. He was to explain his whereabouts. He did not do so. There was room for him to explain. There was another copy of the same letter, dated June 15, 2014. This was not issued in error. It was issued after the days he was expected to return, had lapsed. On June 15, 2014 he was deemed a deserter. The letter is not manufactured. Mercy did not have a discussion with the claimant on desertion. She did not meet him during the period of desertion. If there was any gap on N.S.S.F, it was rectified by N.S.S.F. The respondent did not formally terminate the claimant's contract. It did not unlawfully declare the claimant a deserter. Redirected, Mercy told the court that the claimant never showed up for duty, after being declared a deserter. He was sent the letter dated June 15, 2014, because he had not responded to the first letter.
  13. The issues are: whether the claimant's contract was terminated by the respondent unfairly, or at all; and whether he merits the remedies sought.



**The Court Finds: -**

14. The claimant was granted sick-off of 5 days, to enable him seek medical review, having been involved in a road traffic accident, way back in October 2013.
15. The Claimant applied for sick-off, on February 26, 2014. He was granted 5 days, commencing February 27, 2014, ending March 3, 2014. March 4, 2014 was his resumption date. This is shown in his application and leave dispatch form. He did not resume on March 4, 2014.
16. He states in his Statements of Claim and Witness, that he reported back on June 10, 2014. This is disputed by the respondent, who states that the claimant did not report back, or explain his whereabouts, and was therefore declared a deserter, on June 14, 2014.
17. The claimant did not explain why he did not report to work after 5 days, in accordance with the terms of his sick-off. Whether he returned on June 10, 2014 or did not return at all, was in violation of his terms of sick-off authorisation. He extended his sick off unilaterally, to either 10<sup>th</sup> June 2014, or eternally.
18. Without any explanation for his absence after the 5 days expired, the claimant would be deemed to have absconded or deserted. The claimant was absent from duty, after the sick-off expired, without leave. Abscondment is deemed to have occurred when the Employee is absent for a time that warrants the inference, that the Employee does not intend to resume. The claimant was away for 10 days from the date he was supposed to resume. Desertion is deemed to have taken place, when the Employee has actually intimated that he does not intend to return to work.
19. There are elements of both forms of absence, shown in the evidence before the court. Even after the respondent wrote the letter declaring the claimant a deserter, on June 14, 2014, 10 days after the claimant was supposed to have reported back, the claimant made to effort to explain his absence. The Respondent would be correct in making the inference, that the claimant did not intend to return to work. The respondent would also be correct in taking the lack of response from the claimant, as his intimation that he did not intend to return. He alleged that he was advised to go home and would be recalled, but was not recalled. He did not follow up on the alleged promise for a recall. He did not write to the Respondent or visit the Respondent and harangue the respondent on its promise to recall him. He did not call the Respondent and ask when he should resume. There was no letter of dismissal, and the claimant was aware about the letter claiming he was a deserter. He, by remaining at home, and by not seeking to give an explanation for his absence, would be deemed to have absconded and/or deserted.
20. In either case, he was absent without leave or other lawful cause from the place appointed for performance of his work, which is an employment offence, under section 44 [4] [a] of the [Employment Act](#), amounting to an act of gross misconduct, warranting summary dismissal.
21. The respondent did not however satisfy the minimum standards of a fair procedure, under section 41 and 45 of the [Employment Act](#). The declaration of desertion was not followed by any attempt at hearing the claimant. There was no letter preceding the declaration, asking the claimant to show cause why he should not be declared a deserter and/ or dismissed. A declaration of desertion was a decision made by the respondent, but without giving the claimant a chance to explain his absence. The right to be heard in disciplinary processes, is not vitiated by abscondment or desertion. There must be a reasonable attempt shown by the Employer, to take the Employee through a disciplinary hearing. There must be an invitation to attend a disciplinary hearing. The opportunity to be heard must be availed to the Employee. In this dispute the court is not satisfied that the Respondent made reasonable effort to convene a disciplinary hearing. It was not sufficient to declare the claimant a deserter, and end it there.



- The contract of employment ought to have been ended formally through a letter of summary dismissal or termination, preceded by a reasonable effort at hearing the claimant.
22. In the view of the court therefore, termination was based on valid ground, but faulty procedure, and to this extent, unfair.
  23. The claimant prays for 2 months' salary arrears. He did not in his evidence clarify which months he was not paid his salary. The court has not seen evidence in support of this prayer, oral or documentary. The prayer is disallowed.
  24. The claimant absconded or deserted work, after his 5-day sick-off expired. The respondent, as observed above, would be entitled to summarily dismiss the claimant, for gross misconduct. The law does not contemplate that Employees who abscond or desert, and who merit summary dismissal, are notified about termination of their contracts of employment. The prayer for notice pay has no merit.
  25. The prayer for general damages for unlawful termination, in addition to the prayer for statutory compensation for unfair termination, is misplaced. The claimant has not established that unlawful conduct on the part of the respondent, merits separate award from that availed for unfair conduct. He has not established that he merits general damages, as well as compensation, to remedy the same wrongful conduct.
  26. The claimant worked for about 3 years. He did not intimate to the court how long he expected to continue working. He is found to have absconded or deserted. It can perhaps be deduced that he did not expect to go on working after his sick-off, having opted to abscond and/ or desert. The respondent's fault, is in not affording the claimant an opportunity to be heard, and in issuing a mere letter declaring the claimant a deserter, instead of hearing him and terminating the contract formally, through a letter of dismissal or termination. The claimant was to a large extent, the author of his own misfortune. He merits minimal compensation for unfair termination, which the Court awards at 1-month salary, at Kshs. 16,500.
  27. No order on the costs.
- In Sum, it is Ordered: -
- a. The respondent shall pay to the claimant 1- month salary in compensation for unfair termination, at Kshs. 16,500.
  - b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27<sup>TH</sup> DAY OF MAY 2022.**

**JAMES RIKA**  
**JUDGE**

