



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 5 OF 2019

WILSON KIHARA MWANGI.....CLAIMANT

VERSUS

ALMASI BEVERAGES LIMITED.....1st RESPONDENT

ALMASI BOTTLERS LIMITED.....2nd RESPONDENT

JUDGMENT

1. In the submissions filed on 31 March 2021, Wilson Kihara Mwangi (the Claimant) identified the Issues for determination as:

(i) Whether the Claimant's resignation was involuntary and unlawful?

(ii) Whether the Claimant was subjected to unfair labour practices, and whether the disciplinary hearing and appeal as conducted by the Respondent was done in accordance with the law?

(iii) Whether the Claimant's employment was unfairly terminated?

(iv) Whether the Claimant is entitled to the reliefs sought?

2. Almasi Beverages Ltd and Almasi Bottlers Ltd (the Respondent) filed its submissions on 5 May 2021, and it addressed 3 Issues:

(i) Whether there was a valid reason for the employer to contemplate taking disciplinary action against the employee?

(ii) Whether before taking such disciplinary action as the employer deems fit, the employee is taken through a disciplinary process that demonstrates fairness?

(iii) Whether the Claimant is entitled to prayers sought in the Statement of Claim?

Involuntary resignation

3. An involuntary resignation ordinarily connotes constructive dismissal.

4. The Claimant was, at all material times, a Regional Sales Manager based in Kisii.

5. On 1 June 2018, the Claimant gave a 3-month notice of resignation. However, he did not give any reasons in the notice.

6. At the time of the notice, the Claimant had 15 days outstanding leave. Consequently, the Respondent's General Manager instructed the Claimant to proceed on the outstanding leave while waiting for further communication on the resignation.

7. On 24 June 2018, the Respondent's Human Resources Manager informed the Claimant that his leave would end on 27 June 2018 and, therefore, he should resume duty on 28 June 2018 for further instructions.

8. The Claimant did not report back, and on 26 July 2018, the Human Resources Manager issued a show-cause whose subject was absconding duty from 28 June 2018.

9. The Claimant was requested to respond within 4-days and he responded on 30 July 2018, indicating that he had been sent on compulsory leave through an email of 4 June 2018.
10. The Claimant also raised several concerns in the response on how he had been treated since giving his notice of resignation.
11. In paragraph 10 of the Statement of Claim, the Claimant set out in great details what he considered to be frustrations from the Respondent's Chief Executive Officer, General Manager, Commercial Manager and Group Human Resources Manager.
12. The Claimant did not disclose during oral testimony when the aforesaid Managers made the work environment hostile. Most of the emails he introduced into evidence were written after he had tendered his resignation on 1 June 2018.
13. The Claimant further challenged the process on the ground that his appeal was not considered.
14. The Claimant appealed to the Chief Human Resources Manager on 27 August 2018. He indicated that he was appealing in terms of section 27.8 of the Human Resources Policy Manual.
15. The Chief Human Resources Manager advised him on 28 August 2018 to appeal to the right Officer.
16. A copy of the Manual was not produced in Court, and the Court cannot find that the Claimant appealed to the competent Manager.
17. On the state of the evidence presented in the Court, the Claimant did not satisfy the test of proving that his resignation was involuntary or that the employer created a hostile work environment warranting him asserting constructive dismissal.

Unfair termination of employment

Procedural fairness

18. The Claimant gave a notice of termination. The employer instructed him to proceed on outstanding leave. He was later instructed to report back on 28 June 2018.
19. The Claimant did not report back, and on 26 July 2018, he was issued with a show-cause notice. The notice set out the allegation the Claimant was expected to respond to which he did on 30 July 2018.
20. On 6 August 2018, the Respondent invited the Claimant to attend a disciplinary hearing on 13 August 2018. He was informed of the right to be accompanied by a colleague.
21. The Claimant attended the hearing, and upon a recommendation by the Disciplinary Committee, he was notified of summary dismissal through a letter dated 20 August 2018.
22. Sections 35(1) and 41 of the Employment Act, 2007 are the primary provisions assuring employees of certain protections when the employer intends to terminate a contract.
23. The Respondent notified the Claimant of the allegations to confront. He was allowed to make a written response. He was later given another opportunity to make oral representations.
24. The Court is satisfied that the Respondent was in compliance with the statutory procedural fairness requirements.

Substantive fairness

25. By dint of sections 43 and 45 of the Employment Act, 2007, the Respondent was expected to not only prove but prove as valid and fair the reasons for dismissing the Claimant.
26. The allegation against the Claimant was absconding duty from 28 June 2018.
27. The Claimant tried to explain the failure to report to work as instructed on lack of facilitation (bus fare) and failure to pay his May and June salaries on time.
28. He also seemed to suggest that he had been sent on compulsory leave.
29. The Court has looked at the email the Claimant asserts sent him on compulsory leave. The email does not talk about compulsory leave. Instead, it refers to prior discussions with the Claimant and that he proceeds for his leave balance.
30. The Court finds nothing untoward in the Respondent instructing the Claimant to utilise his leave balances during the notice period.
31. The Claimant also said he could not report back to work because of delayed salaries. However, he admitted during the disciplinary hearing that the Respondent had a policy where such expenses would be reimbursed after being incurred.

32. The Claimant did also not attempt to bring the issue of facilitation at the point he received the email instructing him to report to work.

33. The Court is satisfied that the Respondent has proved valid and fair reasons to dismiss the Claimant.

34. Because the Respondent did not give the Claimant prior notice or show-cause on the grounds of insubordination and misrepresentation on stock worth Kshs 2,600,000/-, the Court will not consider them for purposes of this judgment.

35. In view of the conclusions on unfair termination of employment, compensation and salary in lieu of notice do not arise.

Breach of contract

Leave allowance

36. The Claimant sought leave allowance of Kshs 122,404/-. The employment agreement provided for the equivalent of a 1-month basic salary as leave allowance.

37. The dismissal letter offered the Claimant the leave allowance, and if it has not been paid, payment should be made.

Salaries for July and August 2018

38. The Claimant was dismissed through a letter dated 20 August 2018, but the effective date of dismissal was given as 29 June 2018.

39. The Claimant contended that the backdating of the date of dismissal was illegal, and therefore he was entitled to salaries for July and August 2018 amounting to Kshs 454,526/-.

40. The Respondent, on the other hand, took the view that since the Claimant was not at work having absconded from 28 June 2018 was not entitled to the salaries for the two months.

41. The law contemplates that the employer explains the reasons for the dismissal at a specific point in time.

42. However, like any general rule, there are exceptions.

43. In the Court's view, where the reason leading to dismissal is absconding duty, and it is proved by the employer, then the employer would not be under a contractual or legal obligation to pay salaries for the time the employee was not at work.

44. In the case at hand, the Court finds that the Claimant did not report to work after 28 June 2018. He would not be entitled to salaries for July and August 2018.

Car loan

45. The Claimant did not lay an evidential foundation to this head of the claim either in the witness statement or oral testimony.

Certificate of Service

46. A certificate of service is a statutory entitlement.

47. Accordingly, the Respondent should issue a Certificate of Service to the Claimant.

Conclusion and Orders

48. From the preceding, save for a certificate of service, the Court finds no merit in the Cause, and it is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 16th day of June 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms Ochieng instructed by E.A. Ochieng & Co. Advocates

For Respondent Mr Ouma Dickens instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura