



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT NAIROBI**

**CAUSE NO. 1144 OF 2017**

***(Before Hon. Justice Dr. Jacob Gakeri)***

**HENRY SHIKOLI MILIMU.....CLAIMANT**

**VERSUS**

**HYPERMART LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed a statement of claim on 20<sup>th</sup> June 2017 alleging that the personal assistant of the Respondent's Director suspended him from duty on 16<sup>th</sup> March 2017 through an oral representation on allegations that he was a suspect in a robbery incident at the company which created anxiety on his part.

2. That on 24<sup>th</sup> March, 2017, the Respondent terminated the Claimants employment without prior notice or warning by a letter dated 16<sup>th</sup> March, 2017. The Claimant acknowledged receipt of the letter on 24<sup>th</sup> March, 2021. He avers that termination of employment was unfair, unprocedural and inimical to fair labour practices.

3. That as a result of the termination he suffered loss and damage and is claiming the following;

(a) Pay for 7 days suspension Kshs.13,363.09;

(b) Pay of remaining employment period to retirement age (55 years less the current 35 years = 20 years -

(12 months x 42,000 x 20 = Kshs.10,080,000);

(c) Severance pay (42,000 x 12) = Kshs.504,000;

(d) Accrued leave days to retirement age -

(420 + 18) = 438 days x 1,909.09 = Kshs.836,181.42;

Total Kshs.11,433,545.00;

(e) Costs of the suit and

(f) Interest on (a) to (e) above.

4. The Respondent filed its memorandum of response on 15<sup>th</sup> August 2017 denying the Claimant's allegations other than the fact that the Claimant was terminated on 16<sup>th</sup> March, 2017 and the termination was proper, lawful and justified on the premise that on 10<sup>th</sup> March 2017, the Claimant absented himself from work without leave or any lawful excuse. Initially the Claimant had intimated that he was attending to a medical emergency involving his spouse but subsequently changed the explanation that he had attended an interview in Embu which is denied in Court. That the Claimant was given the opportunity to provide material or documentation as evidence of the emergency but failed to do so. The Respondent alleged that the Claimant's absence from duty without leave or lawful cause was tantamount to carelessness and recklessness in the performance of his duties. The summary dismissal on 16<sup>th</sup> March, 2017, was justified and all terminal dues were remitted to the Claimant as tabulated in the dismissal letter dated 16<sup>th</sup> March, 2017, which the Claimant acknowledged receipt. A total of Kshs.75,141.00 was paid net of PAYE, NHIF and NSSF.

5. The Respondent denied owing the Claimant Kshs.11,433.545.00 or any part thereof and prayed that the suit be dismissed with costs.

## **Evidence**

6. The suit was heard on 3<sup>rd</sup> August 2021. Both CW1 and RWI adopted their written witness statements on record and were cross- examined.

7. The Claimant testified that he was employed by the Respondent on permanent basis until he was terminated. That he was an Accounts assistant and no complaint had previously been made about his performance. That on 16<sup>th</sup> March, 2017 he was summoned by the personal assistant to the director, who by word of mouth suspended him from work on allegations of a suspected robbery incident at the Company and on 24<sup>th</sup> March 2017 he received a letter dated 16<sup>th</sup> March, 2017, terminating his employment for absconding duties on 10<sup>th</sup> March, 2017 and no warning letter or notice had been issued on his performance or conduct.

8. On cross examination, he confirmed that he was reporting to the Head of Accounts who in-turn reported to the Human Resource Officer. That at one point he had to apologise in writing for reporting to work late but no disciplinary proceedings were preferred against him. That on the morning of 10<sup>th</sup> March, 2017, at 5.11 am, he texted Mr. Kioko, the Human Resource Officer to inform him that he had a medical emergency to attend to and would report to work very late but did not report at all. He reported on the following day which was Saturday. He testified that he had taken his wife to St. Mary's Hospital, Lang'ata, and was not aware that the Director had been notified of the emergency. That on 11<sup>th</sup> March, 2017, he explained his absence to Mr. Kioko when the latter enquired about the emergency. That he gave the same information to Mr. Manish, the Director, who was already aware of the medical emergency. He enquired about the patient and the medical report. The Claimant confirmed that he had paid for the services at the hospital, was given a card and left in search for more money. He testified that because of the bad blood between him and his in laws, the in laws took the wife to the aunt's place.

9. He averred that he did not lie about the wife's indisposition and did not provide the doctor's report as requested by the director nor did he disclose the alleged family disagreements to the director or Mr. Kioko. He testified that he did not inform the director or Mr. Kioko had he had challenges securing the doctor's report. He confirmed that he was a member of NSSF and was making contributions. He also confirmed that he was paid one month's salary, the days worked in March 2017 and leave days as tabulated in the letter of termination.

10. Mr. Kioko testified that he was aware of the case. That on the morning of 10<sup>th</sup> March 2017, he received a text message from the Claimant at 5.11 am informing him that he had a medical emergency. He expressed his empathy and wished the Claimants wife well. He called the Claimant from the office later that morning who disclosed that he had taken his wife to St. Mary's Hospital, Lang'ata for medical attention. The Claimant promised to call at 10.00 am but did not. Mr. Kioko informed the director about the emergency who promised to assist if need arose. Calls to the Claimant later that morning went unanswered yet he was on WhatsApp at 11.51 am. The Claimant texted at 12.01 pm stating that he was in the doctor's room when Mr. Kioko called him. He averred that the Claimant called to say that he would report to work at 2.00 pm but did not. That on 11<sup>th</sup> March, 2017 when the Claimant reported on duty, he was apologetic and informed Mr. Kioko that the reason for his absence from duty was that he had attended an interview in Embu. Mr. Kioko testified that he informed the Claimant that the director was already aware of the emergency and the second explanation. That after meeting with the director, the personal assistant to the director was to follow up on the doctor's report from the Claimant. The report had not been presented by 16<sup>th</sup> March, 2017. He testified that the Claimant was aware that evidence was required to explain his absence from work on 10<sup>th</sup> March, 2017. He also confirmed that the Claimant was a permanent employee of the Respondent and had worked for 6 years.

11. On cross examination, he confirmed that the request for the doctor's report was verbal as were all meetings with the director and finally that the Claimant had sufficient time from 11<sup>th</sup> to 16<sup>th</sup> March, 2017, to avail the required documentation.

## **Claimant's Submissions**

12. The Claimant submissions were dated 9<sup>th</sup> August 2021. The crux of the submissions was that the Claimant was unlawfully and unfairly terminated on the basis of unsubstantiated rumours and was not accorded an opportunity to be heard contrary to the principles of natural justice as enshrined in the Constitution of Kenya, 2010 and the Employment Act, 2007.

13. According to the Claimant the issues for determination were: -

- (i) Whether the Claimant was a permanent and pensionable employee of the Respondent and the process of termination envisaged under the Employment Act, 2007;
- (ii) Whether the dismissal/termination process was followed;
- (iii) Remedies sought;
- (iv) Cost of the suit.

14. On the nature of employment, it was submitted that the Claimant was a permanent and pensionable employee since the Respondent did not deny the assertion.

15. In addition, there was a contract of service between the parties. The Claimant was an employee and the Respondent was an employer by virtue of Section 2 of the Employment Act having served the Respondent from 2013 to 2017.

16. On the process of termination, the Claimant submitted that his absence from work on 10<sup>th</sup> March, 2017 was within the knowledge of Mr.

Kioko who had been informed of the medical emergency the Claimant had to deal with that morning. On 11<sup>th</sup> March, 2017, the Claimant reported to work and explained to Mr. Kioko the reason for his absence the previous day. The Claimant submitted that Mr. Kioko gave a different explanation to the director, who summoned the Claimant on a Wednesday for an explanation of his absence on 10<sup>th</sup> March, 2017. Regrettably, the Claimant had no documentary evidence to substantiate the medical emergency of the spouse. He explained the circumstances to the director.

17. The Claimant further submitted that he was subsequently accused of lying about the spouse's illness, whereas he had attended an interview in Embu. He was summarily dismissed on 16<sup>th</sup> March, 2017, in contravention of the Employment Act. The argument was reinforced with Section 44(1) of the Employment Act. It was urged that the Claimant was entitled to at least one month notice. That reliance on Section 44(4)(a) of the Employment Act, 2007 (absence from work without leave or other lawful excuse) was unjustified since the Claimant had provided sufficient information to Mr. Kioko, the head of human resource. It was urged that although the Claimant had no material proof of his absence from work, he was not accorded fair hearing. Reliance was made on the Court of Appeal decision in **Standard Group Limited v Jenny Luesby [2018] eKLR** on the right to a notice and fair hearing before summary dismissal. Further reliance was made on **CMC Aviation Limited v Mohammed Noor [20151 eKLR]**.

18. Finally, the Court was urged to find that the dismissal was unfair because the Respondent abandoned the Claimant at his hour of need as opposed to indulging him, which was characterized as an unfair labour practice.

#### **Respondent's Submissions**

19. According to the Respondent the issues for determination are: -

- (i) Whether the Respondent had a valid reason to terminate the Claimant
- (ii) Whether the Claimant's termination was procedurally fair
- (iii) Reliefs.

20. On the reason for termination, counsel submitted that it was common ground that the Claimant was terminated in writing on 16<sup>th</sup> March, 2017 and the letter set out the reason for termination and the Claimant received his terminal dues made up of 16 days worked in March, 2017 accrued leave days and service pay.

21. It was also submitted that the Claimant had not served without blemish as the letter dated 27<sup>th</sup> May, 2016 shows. He was apologizing for reporting to work late and poor delivery of tasks.

22. That the Claimant did not report to work on 10<sup>th</sup> March, 2017 without permission but had indicated he had a medical emergency to attend to and would report late but did not report at all.

23. It was submitted that the Claimant was aware that the Respondent required documentation to confirm his absence from duty. The Claimant did not provide any document in support of his claim.

24. Counsel submitted that Section 44(4)(a) of the Employment Act, 2007 justified summary dismissal of an employee for misconduct **if an employee without leave or other lawful cause absented himself** from the place of work.

25. That the Respondent had a reason to terminate the Claimant.

26. Reliance was made on the decision in **Consolata Kemunto Aming'a v Milimani High School [20191 eKLR]** on absence from work. Further assistance was sought from the decision in **Rodgers Titus Wasike v General Motors East Africa Limited [2020] eKLR** where an employee had no explanation for his absence from work. Counsel submitted that since the Claimant was aware that some documentary evidence was required from 11<sup>th</sup> March, 2017 to 16<sup>th</sup> March, 2017, and did not indicate his inability to provide the documentation, he had the opportunity to present his explanation to the Respondent, that the procedural requirements attendant to dismissal were complied with. The decision in **R v Immigration Appeal Tribunal Ex parte Jones [1988] 1 WLR 477** was used to reinforce the argument on the diversity of procedures an employer may adopt in disciplinary matters subject to ensuring fairness. The decision in **Joseph D. Baraza v United [EA.1 Warehouse Limited [20141 eKLR]** was relied on for the proposition that the process contemplated by section 41 of the Employment Act, 2007 need not be an oral hearing, correspondence is sufficient. A similar holding was made in **Edwin Nyamanga v Silver Holdings Limited [2014] eKLR**. Counsel urged the Court to find that the Respondent had complied with the requirements of procedural fairness before terminating the Claimant.

27. It was contended that since the Respondent had a valid reason to terminate the Claimant's employment and complied with the law on procedural fairness, the Claimant is not entitled to any of the reliefs sought for unfair termination. That since the Claimants prayers are premised on anticipated income until retirement, they were not available to him. Reliance was made on the Court of Appeal decision in **D. K Njagi Marete v Teachers Service Commission [2020] eKLR** where the Court was emphatic that anticipatory earnings had no legal anchorage and are not available when contracts of employment are terminated.

28. Finally, counsel submitted that the claim for severance pay was misconceived since the Claimant was not terminated on account of redundancy. The decision in **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Comboni Polytechnic [2019] eKLR** was relied upon on the non-availability of severance pay except in a redundancy.

## Analysis and Determination

29. Flowing directly from the pleadings, evidence and the submissions, the following issues commend themselves for determination.

- (a) Whether the Claimant's termination was unfair;
- (b) Whether the Claimant is entitled to the reliefs sought;
- (c) Costs of the suit.

30. On termination, it is not in dispute that the Claimant was an employee of the Respondent from 2013 to 16<sup>th</sup> March, 2017 when he was terminated for absence from duty on 10<sup>th</sup> March, 2017, allegedly to deal with a medical emergency involving his spouse. According to the Claimant, Mr. Kioko had been briefed on the morning of the material day and was therefore aware of the Claimant's absence. On 11<sup>th</sup> March, 2017, when the Claimant reported to work, he rehearsed the explanation to Mr. Kioko but **alleges that Mr. Kioko had already given the director a different** explanation of his absence, that he had attended an interview in Embu. Mr. Kioko denied this allegation in his evidence. The Claimant was subsequently summoned by the director who required an explanation for his absence and evidence to substantiate the claim. The Claimant had no documentation on him, a fact he explained to the Director.

31. The Respondent's witness Mr. Kioko testified that the Claimant made no attempt to provide any documentation to explain his absence on 10<sup>th</sup> March, 2017. He did not even promise to deliver the documentation. He assumed that the explanation he had given was sufficient. Needless to emphasize, medical emergency is not a run of the mill reason for absence at the work place. Explanation by word of mouth may not be sufficient since a medical emergency typically involves payment and substantial documentation. It is unclear why the Claimant could not provide evidence to authenticate his claim that he was attending to a medical emergency. During the hearing, the Claimant told the Court that he paid for the hospital card but handed it over to the wife's aunt to take care of the wife as he searched for more cash and that the wife went to the aunties place and they were hostile to him. The Court found the explanation difficult to believe. The Court is of the view that between the 10<sup>th</sup> March and 16<sup>th</sup> March, 2017, the Claimant had sufficient time either to provide some document from the hospital or at least undertake to furnish the same when available. The Court is of the view that if the medical emergency existed, there was sufficient documentation to demonstrate the Claimant's involvement on that day.

32. Relatedly, the Claimant kept off and was not enthusiastic about communicating with the employer on that day. It is unclear where he went to search for money, whether he got it and even whether he returned to the hospital and what transpired thereafter.

33. In addition, the allegation about suspension by the personal assistant of Director sounded untrue, but the Respondent offered no explanation why the letter dated 16<sup>th</sup> was received by the Claimant on 24<sup>th</sup> August, 2017.

34. Section 45(2)(a) and (b) of the Employment Act, 2007, provides that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid, that the reason for the termination is a fair reason -

- (i) Related to the employee's conduct capacity or compatibility, or
- (ii) Based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

35. Section 43 of the Employment Act provides that: -

### 43. Proof of reason for termination

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

36. It is common ground that the Claimant was absent from his place of work on 10<sup>th</sup> March, 2017 allegedly to attend to a medical emergency involving the spouse, a fact he communicated to Mr. Kioko that morning, as confirmed in their testimony. Mr. Kioko testified that he expected the Claimant to provide documentation to explain his absence, which he did not and when he subsequently appeared before the director, he had nothing to show and was subsequently terminated.

37. The Claimant's allegation that all receipts and records of the emergency were in the hands of his in-laws with whom he was not in good terms, yet he is the one who took the spouse to hospital and paid for the services is in the Court's view not believable.

38. It is public knowledge that sufficient hospital records are retained by the institution for purposes of records and follow up and a confirmation of treatment can be availed on request. Hospitals and clinics are on request ready and willing to furnish written evidence of visitations and treatment accorded to patients.

39. This Court is satisfied and finds that the Respondent genuinely believed that the Claimant was lying about the emergency which

culminated in his termination for absence from duty on 10<sup>th</sup> March, 2017, in accordance with Section 43(2) of the Employment Act. He absented himself from his place of work without leave or other lawful cause.

40. On the issue of procedure, the Claimant testified that on 11<sup>th</sup> March 2017, he explained his absence to the head of human resource and in his view believed that the matter had rested only to be summoned by the director on a Wednesday to substantiate the same with evidence which he did not have and could not avail immediately as adverted to elsewhere in this Judgment.

41. The salient question for determination is whether the Claimant had been notified that his removal was being considered and the reason(s) thereof.

42. The Respondent did not adduce any evidence of any notice to show cause or disciplinary proceedings. No record or minutes of any meeting were availed as evidence.

43. Section 41 of the Employment Act, 2007 requires all employers to not only inform the employee the ground(s) of dismissal in language that the employee understands and in the presence of a representative of his choice, but also to hear and consider any representations which the employee may make.

44. The notice is intended to put the employee on notice that the question of his termination has arisen if a satisfactory or acceptable explanation and or representation is not provided. The decision in **Rodgers Titus Masike v Genera! Motors East Africa Limited** relied upon by the Respondent is unhelpful because the procedure in matters of termination is a statutory prescription. This is consistent with the Court of Appeal decision in **Standard Group Limited v Jenny Luesby [2018] eKLR** where the Court emphasized the importance of the right to a fair hearing before termination. "*It remains the sacrosanct duty for an employer to uphold*", the Court observed.

45. In **CMC Aviation Limited v Mohammed Noor [2015] eKLR**, the Court of Appeal was categorical that: -

*"... where there is fair reason for terminating an employee's services but the employer does it in a procedure that does not conform with the provisions of a statute, which still amounts to unfair termination."*

46. Applying the above provisions and principles of law in the instant case, the Court is satisfied and finds that the Claimant's termination was unfair for want of procedural fairness as provided by the law.

47. On the reliefs sought, the Court finds as follows: -

(i) Pay for 7 days suspension period Kshs.13,363.63.

The Respondent did not contest this claim. The Claimant is awarded Kshs.13,363.63.

(ii) Pay for remaining employment to retirement age of Kshs.10,080,000.00.

The Claimant led no evidence to prove this claim. Anticipatory damages are not available in contracts of service which are typically terminable by notice of either party. The Claimant did not establish this claim, as held by the Court of Appeal in **Elizabeth Wakanyi Kibe v Telcom Kenya Limited [2014] eKLR**.

In **Hassan Magiya Kiage v Attorney General st another [2017] eKLR** the Court of Appeal was unequivocal that: -

*"Moreover, this Court has held before that where a claim is predicated on notice, then if the termination process was fair, the damages awardable are those equivalent to the period of the notice provided for in the contract."*

In **D. K. Niagi Marete v Teachers Service Commission [2020] eKLR** the Court of Appeal adopted with approval the sentiments of Rika ]. on anticipatory payments as follows: -

*"There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it would not be terminated ... No employment is permanent. That is why the Employment Act does not mention the word "permanent employment."*

The claim is dismissed.

(iii) Severance pay of Kshs.504,000.00.

Under the provisions of the Employment Act, 2007, severance pay is not available in terminations other than redundancy under Section 40(1)(g). Since this is not a case of redundancy, the claim for severance pay is dismissed.

(iv) Accrued leave days of Kshs.836,181.42.

The Claimant lead no evidence to establish this claim. This claim is dismissed for want of proof.

(v) Compensation for Unfair Termination

Section 49(1) sets out the remedies available to an employee for unfair termination or summary dismissal. Since the Claimant had already received payment in lieu of notice, salary for March, 2017 up to 16<sup>th</sup>, and 20 leave days, the only remedy available is compensation for unfair termination and bearing in mind that the employee caused or contributed to the termination and had served for about 6 years, the Court is of the view that the equivalent of 2 months' salary is adequate in the circumstances.

48. The upshot is that Judgment is entered for the Claimant as follows:-

(i) Pay for 7 days suspension period Kshs.13,363.63

(ii) Two (2) months' salary for unfair termination

(42,000 x 2) Kshs.84,000.00

**Total Kshs.97,363.63**

(iii) Interest at Court rates from the date of this Judgment till payment in full.

(iv) Since the claim is partially successful the Claimant is awarded 50% of the taxed costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2021**

**DR. JACOB GAKERI**

**JUDGE**

**Delivered in the presence of:**

Rabala for the Claimant

Mutua for the Respondent