



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1012 OF 2017

JANE NDUTA MUCHENDU.....CLAIMANT

VERSUS

EASTERN DEANERY AIDS RELIEF PROGRAMME.....RESPONDENT

JUDGEMENT

1. The dispute herein stems from the events of 24th May, 2016 when the claimant was sent on unpaid leave effective that date, until 30th September, 2016. The claimant interpreted this action on the part of the respondent as amounting to termination, hence this claim.
2. The claimant seeks the following reliefs against the respondent;
 - a) A declaration that the termination was unlawful.
 - b) Salary for the month of May, 2016 being Kshs 47,590/=.
 - c) I months' salary in lieu of notice.
 - d) Service pay being Kshs 214,155/=.
 - e) 12 months' pay as compensatory damages for abrupt and traumatizing loss of employment being Kshs 571,080/=.
 - f) Certificate of service.
 - g) Costs of the suit.
 - h) Interests at court rates.
3. The claim was contested vide the respondent's reply filed on 7th July, 2017 through which it denied terminating the claimant's services. The respondent contended that the claimant consented to proceeding on unpaid leave and that she was even requested to resume work thereafter, but she declined.
4. The parties admit that they were in an employment relationship. What is in dispute is the manner in which the same was severed and the benefits payable thereunder.
5. The matter proceeded for hearing on 3rd August 2021 and each side called one witness.

Claimant's case

6. The claimant testified as CW1 and sought to adopt her witness statement as part of her evidence in chief. She also produced her bundle of documents as exhibits before court.
7. It was her testimony that she was employed as an AA officer by the respondent on a contractual basis with effect from 1st July, 2007. That her contract was renewable yearly. She averred that she discharged her duties diligently and faithfully until 24th May, 2016 when her employment was terminated.

8. It was her testimony that on 24th May, 2016, she was called by the respondent's Human Resource Manager, who accused her of being absent from work from 16th- 18th May, 2016. That the said Human Resource Manager then handed her a letter dated the same date and which stated that she was to proceed on unpaid leave immediately. She told court that she was made to sign the said letter under duress.

9. The claimant asserted that the respondent's act of sending her on unpaid leave was a guise to terminate her services.

10. In cross examination, the claimant admitted being absent from work for 3 days that is, 16th -18th May, 2016. She also admitted appending her signature on the letter sending her on compulsory leave and indicated that she only did so, as she feared the implications of not signing the same. She also admitted during cross examination that at the material time, she had some personal problems.

Respondent's case

11. The respondent's Human Resource Manager, Mr. David Mwangi, testified as RW1. He also sought to rely on his witness statement, which he adopted as part of his evidence in chief. He also relied on the bundle of documents filed on behalf of the respondent and which he produced as exhibits before court. This was with the exception of the claimant's pay slip for the month of May, 2016 whose production was successfully objected to, by her advocate.

12. RW1 averred that the letter dated 24th May, 2016 executed by the claimant is not a termination letter. He also averred that the claimant consented to proceeding on unpaid leave by signing the said letter willingly. That she was not promised renewal of contract in exchange for her signing the letter. That there was also no guarantee that the claimant's contract will be renewed anyway as the respondent solely relies on donor funds to manage its operations.

13. It was also the testimony of RW1 that the claimant had indicated that she was going through some personal problems hence was granted the unpaid leave to enable her sort out the same. That she didn't indicate her willingness to work on the said 24th May, 2016, hence the leave.

14. RW1 also averred that the claimant was absent from work without permission with effect from 16th -18th May, 2016. That the leave she purports to have been granted by her immediate supervisor was verbal hence was not in line with the applicable rules and procedure of the respondent.

15. RW1 further testified that the claimant was requested to resume duty vide a letter dated 22nd June, 2016 but she declined to do so, through her Advocate's letter dated 24th June, 2016.

16. In cross examination, RW1 admitted that whenever employees have psychological problems, they are granted sick leave as opposed to being sent on unpaid leave. In a quick rejoinder, he stated that the claimant requested for the unpaid leave verbally hence the same granted.

Submissions

17. Both parties filed written submissions with the claimant submitting that she was terminated from employment vide the letter dated 24th May, 2016 which sent her on unpaid leave. The claimant further submitted that the said termination was unprocedural and unlawful and, on this score, it cited the provisions of **sections 41 and 45** of the Employment Act. The claimant further submitted that the respondent had unlawfully withheld her salary for the month of May, 2016 and in this case, sought reliance on the cases of **Thomas Silas Nzivo vs Bamburi Cement limited (2014) eKLR** and **Paul Mwaura Mbugua vs Kagwe Tea Factory Ltd & another (2012) eKLR**.

18. On its part, the respondent submitted that the claimant was not terminated and that she personally agreed to proceed on unpaid leave out of her own will. That the claimant had not proved that she was under duress in executing the said letter. It sought reliance on the case of **Hussein t/a MN Transporters vs Agro-chemical & Food Co. Limited (2002) eKLR** and **Wenslaus Oduki Odinga vs Kenyatta National Hospital Board (2013) eKLR**. The respondent further submitted that the claimant was not entitled to one month salary as her services were never terminated. The respondent further submitted that the claimant had failed to mitigate her losses by returning to work upon being requested to do so. On this issue, it relied on the case of **Hema Hospital vs Wilson Makongo Marwa (2015) eKLR**.

Analysis and Determination

19. Having considered the pleadings before Court, the rival submissions, the documentary and oral evidence by both parties, the issues falling for the court's determination are;

- i. Was the claimant terminated from employment?**
- ii. If the answer to (i) is in the affirmative, was her termination unfair and unlawful?**
- iii. What reliefs if any, avail to the claimant?**

Was the claimant terminated from employment?

20. The claimant has alleged that the respondent unfairly terminated her services when it sent her on unpaid leave for a period of 4 months. This position has been disputed by the respondent who argues that if indeed, its intention was to terminate the services of the claimant, then it would have exercised that option pursuant to her contract of service as opposed to sending her on unpaid leave.

21. The pertinent question therefore is, was the claimant terminated from employment or not?

22. The Blacks Law Dictionary, 9th Edition defines the term “Termination of Employment” as follows;

“The complete severance of an employer-employee relationship.”

23. Further, **Section 47(5) of the Employment Act** places the burden of proving unfair termination of employment or wrongful dismissal on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal. The said provision is in the following terms;

“(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of the employment or wrongful dismissal shall rest on the employer.”

24. In addressing the foregoing provision, the Court of Appeal in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, had this say;

“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

25. Subsequently, and considering the definition of the term **“termination”** and in view of the provisions of **section 47(5)** as well as the finding in the precedent above, the claimant was required to prove that there was complete severance of her employment relationship with the respondent and that the circumstances constituting the same were unfair.

26. The claimant did not produce a termination letter. Instead, she placed reliance on the letter dated 24th May, 2016 and which she maintained was her termination letter. I will reproduce the same hereunder;

“REF: UNPAID LEAVE 25TH MAY-30TH SEPTEMBER, 2016

This is a follow up to the meeting held between you and the Management on 20th and 24th May, 2016. You unlawfully remained absent from duty from 16th -18th May, 2016 (3 days). This prompted your immediate supervisor to look for you and when asked about your absenteeism you indicated that you have dire personal problems and that you need help.

When this matter was brought before the Management, you intimated that you have personal problems that you are unable to resolve and further said you find it difficult to continue giving AA services to our clients.

You did express desire for seeking professional psychological and counselling services. After lengthy discussions, it was agreed as thus;

- 1. That you proceed on unpaid leave since you have exhausted your annual leave.*
- 2. That the same will allow you to seek professional psychological and counselling services.*
- 3. Duration of the unpaid leave -from 25th to 30th September, 2016 both days inclusive.*
- 4. That you must seek professional psychological and counselling services from a recognized institution of your choice.*
- 5. That you shall submit to the management a letter from the institution indicating you can resume your duties effectively. It is worth to note that your resumption of duties will highly depend on the evaluation report from a recognized institution.*
- 6. That you will meet the costs/fees for psychological and counselling services.*

Signed

David K. Mwangi

Human Resource Manager

Confirmation by the employee:

I.....(Name).....acknowledge that the above stated was agreed upon and I have received a copy of this letter.

Signed.....dated.....”

27. From the terms of the said letter, it would appear that the parties had engaged in deliberations which are not before court and which culminated in the claimant proceeding on unpaid leave.

28. During cross examination, the claimant admitted that at the material time, she had personal problems and that she had been absent from work for 3 days as alleged by the respondent. Her only contention was that she had obtained verbal leave from her supervisor.

29. The claimant's contract of employment is silent as regards unpaid leave. Similarly, the Employment Act is silent on the same hence there are no legal and/or contractual parameters to apply against the case herein in order to ascertain if the claimant's unpaid leave was within the law or not.

30. Be that as it may, in the ordinary sense of an employment relationship, it is not uncommon for an employee to proceed on unpaid leave for whatever reason. This may be upon the request of an employee. The letter of 24th May, 2016 (hereinafter the letter), intimates that the claimant informed the respondent management of the fact that she had personal problems and that she needed professional psychological and counselling services. It was on that account that she was granted the unpaid leave. As per the letter, the said unpaid leave was also informed by the fact that the claimant had exhausted her annual leave days.

31. During cross examination, the claimant admitted that at the time, she had personal problems as her mother was unwell and admitted in hospital hence she was unable to render services to her AA clients at the time.

32. The foregoing lends credence to the respondent's assertion that the claimant was not in a position to work or render any services at the time hence the unpaid leave.

33. In any case, when the claimant protested the unpaid leave through her Advocates, the respondent vide a letter dated 22nd June, 2016, indicated that her services had not terminated and that she was on unpaid leave.

34. It would therefore appear that at that point, the respondent had not shut its doors to the claimant and still considered her its employee. That would not have been the case had the respondent actually terminated her services. Accordingly, it can be inferred that there was no severance of the employment relationship from the respondent's end.

35. In view of the foregoing, the court finds that the claimant has failed to prove that her services were indeed terminated. Having found as such, it is not necessary to consider whether the termination was unfair and unlawful, hence that issue falls by the wayside.

36. The claimant has also alleged that she signed the letter sending her on unpaid leave under duress, hence it is imperative to address that issue.

37. In the case of **Wenslaus Oduki Odinga V Kenyatta National Hospital Board [2013] eKLR**, the court held as follows;

“Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant's employment.”

38. The claimant in this case did not furnish the particulars constituting the alleged duress. She merely alleged that the Human Resource Manager, who was RW1, treated her badly and humiliated her by asking her to seek counselling services.

39. As a matter of fact, the claimant admitted during cross examination that she did not stand to lose anything in the event she refused to append her signature to the letter requiring her to proceed on unpaid leave.

40. Therefore, the claimant's assertion that she was under duress when she signed the letter in question is unsubstantiated.

Reliefs

41. The claimant has sought various reliefs which I will proceed to consider hereunder.

Salary for May 2016

42. The claimant has stated that she was not paid salary for the month of May, 2016. However, she admitted during cross examination that she had not checked her bank account for some time since she left the employment of the respondent. She was therefore unable to ascertain before court and indeed confirm as a matter of fact, that her salary for May, 2016 had not been remitted by the respondent. In fact, her behavior to this extent is not consistent with that of a person who is desperately waiting to receive her salary.

43. Above and beyond alleging that she had not been paid, it was incumbent upon the claimant to go an extra mile and furnish the court with evidence to prove her claim. For instance, she could have produced her bank statement in respect of the account through which she used to receive salary at the time, so as to prove that indeed, she had not been paid. Having failed to adduce evidence to justify her claim, this prayer

is denied.

One month salary in lieu of notice

44. This remedy would have been available had the claimant proved that she was indeed terminated and that the same was not in line with fair procedure. Having found to the contrary, this relief is unavailable to the claimant. In the same breath, the claim for compensatory damages on account of unlawful termination fails.

Service pay

45. The claimant has prayed for the sum of Kshs 214,155/= being service pay. Service pay is payable pursuant to section 35 (5) of the Employment Act in cases where termination is pursuant to a notice which was not the case herein. Furthermore, pursuant to the provisions of section 35(6) of the Employment Act, employees who are entitled to payment of gratuity, are not eligible for service pay. In the instant case, clause 2 (c) (ii) of the claimant’s contract of service, provided that she would be entitled to gratuity at the rate of 15% of her gross salary, thus bringing her within the ambit of the exclusions under section 35(6) of the Employment Act. In the circumstances, I find that the claimant is not entitled to service pay hence the claim fails.

Certificate of service

46. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Conclusion

47. The upshot of the foregoing is that the claim is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29H DAY OF OCTOBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Kihunyu

For the Respondent Mr. Ngethe

Court Assistant Barille Sora

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE