



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 430 OF 2017

ISMAEL OTIENO OMOLLO.....CLAIMANT

VERSUS

OSHWAL EDUCATION AND RELIEF BOARD

T/A OSHWAL ACADEMY MOMBASA.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim against the Respondent is for compensation for unlawful termination of employment plus terminal dues. The claim is documented by a Statement of Claim dated 25th May 2017 and filed in court on 6th June 2017. The Respondent filed a Reply on 25th July 2017.

2. The matter proceeded to full trial where the Claimant testified on his own behalf and the Respondent called the Head of School, Jackline Aming'a. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was first employed by the Respondent on 2nd May 2008, as a support staff in the Kitchen Department. His initial monthly salary was Kshs. 6,300 and was progressively increased to Kshs. 14,060.

4. The Claimant further states that sometime in the year 2016, his father became critically ill, forcing the Claimant to make frequent trips to his rural home. On 25th July 2016, the Claimant applied for 21 days' leave after consulting his Facility Manager, Mr. Aazim.

5. The Claimant resumed duty on 17th August 2016 and on 3rd October 2016, he received information that his uncle had passed away. The Claimant adds that he did not plan to attend the burial as he had no funds to travel. However, on 23rd October 2016, which fell on a Sunday, he was offered a ride by a well-wisher, who was travelling for the same burial. The Claimant claims to have informed his supervisor, Madam Sharifa, who gave him permission.

6. Upon returning to work on 2nd November 2016, the Claimant was asked to sign a leave form for the 10 days he had been away, which he did.

7. On 4th November 2016, the Claimant informed his Facility Manager that he had lost his father the previous night. The Claimant states that he gave the same information to his supervisor, Madam Sharifa and the Accountant, Madam Kajal.

8. The Claimant avers that he was given permission to travel and was not required to fill any form. The Claimant claims that he was in constant communication with the Respondent's officers regarding the date of burial, which was slated for 10th December 2016.

9. On 9th December 2016, the Claimant received a call from Madam Roshni Shah, who described herself as the Human Resources Manager, inquiring whether he had received a letter from the School.

10. On 12th December 2016, the Claimant checked his email and found a letter dated 28th November 2016, with the reference 'Absent from Work'. In response, the Claimant sent a copy of the burial permit and mortuary receipt No 005185 to the Respondent. The Human Resources

Manager acknowledged receipt of the documents but informed the Claimant that his written response was required.

11. The Claimant travelled back to Mombasa on 18th December 2016 and reported to the Human Resources Manager on 19th December 2016, who informed him not to report to work until she made a formal response to his letter.
12. The Claimant handed over his response to the Human Resources Manager on 20th December 2016, who upon reading the response, handed the Claimant a termination letter dated 15th December 2016.
13. The Claimant was advised to go and clear with the School on 3rd January 2017, which he did. He handed over his medical card and uniform on 4th January 2017.
14. The Claimant claims that he was not paid his salary for November 2016 and that he had only signed a form for withdrawal of his benefits, which he had not received.
15. The Claimant avers that he had a clean employment record and that the termination of his employment was unfair as he was not given an opportunity to be heard on the reasons for termination.
16. The Claimant's claim is as follows:

- a) One month's salary in lieu of notice.....Kshs. 14,060
- b) Accumulated leave for 7 years.....98,420
- c) Gratuity for 8 years.....56,240
- d) 12 months' salary in compensation.....168,720
- e) Costs

The Respondent's Case

17. In its Reply dated and filed in court on 25th July 2017, the Respondent admits having employed the Claimant as a support staff from 2nd January 2008 until 15th December 2016, when he was summarily dismissed for being absent from work on various instances, without proper authorisation.
18. The Respondent avers that the Claimant applied for 17 days' leave from 25th July 2016 to 10th August 2016 and was scheduled to resume work on 11th August 2016 but extended his leave to 22nd August 2016, without permission.
19. The Respondent further avers that the Claimant was asked to fill a leave form for the 10 days he was absent but he did not comply.
20. Regarding the death of the Claimant's father, the Respondent states that the Claimant was granted 5 days' compassionate leave, having asked for permission from the Facility Manager. The Respondent adds that the leave was not extended and there was no such obligation on the part of the Respondent. The Respondent denies any arrangement that the Claimant was to go back after the burial.
21. The Respondent goes on to state that after the 5 days' compassionate leave had lapsed, several calls were made to the Claimant to inquire as to why he had not returned to work, which would not have been necessary, if the Claimant had been authorised to be absent from work.
22. The Respondent adds that on 22nd November 2016, another call was made to the Claimant to inquire why he had not returned back to work but the Claimant said that he would bury his father on 9th December 2016. The Respondent states that at this point, the Claimant had been away for more than a month, without any written permission or leave form filled. According to the Respondent, the Claimant's annual leave and compassionate leave days had been exhausted.
23. The Respondent avers that a letter dated 28th November 2016, under reference '*Absent from Work*' was sent to the Claimant, advising him to give a formal explanation for his unauthorised absence from work on several occasions. The explanation was to be furnished within a week, which timeline the Claimant did not observe. A further phone call was made to the Claimant on 8th December 2016 to ascertain receipt of the letter and to remind him to respond to it.
24. The Respondent's case is that the Claimant's wilful and habitual absence from work, without proper permission amounted to gross misconduct, thus warranting summary dismissal pursuant to Section 44(4)(a) of the Employment Act, 2007.
25. The Respondent adds that the termination of the Claimant's employment was executed in a fair and procedural manner as the Claimant was accorded a fair opportunity to provide an appropriate explanation for his unauthorised absence from work, prior to the termination.

Findings and Determination

26. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

27. The termination of the Claimant's employment was communicated by letter dated 15th December 2016 stating thus:

"Dear Ismael,

Re: NOTICE OF TERMINATION

This is in reference to your absence from work without clear approval and communication.

We have on several occasions warned you concerning your absenteeism. You applied for 17 days leave from 25th July to 10th August 2016 and you were supposed to resume work on 11th of August but you extended your leave until 22nd August without any permission. On 23rd October, you rang a staff member that you are travelling to your hometown, the reason that you lost your uncle.

On 1st November, you were asked to fill a leave form for the 10 days that you were absent but you did not.

On 4th November, you took permission from the Facility Manager in regards to passing way of your father and you were granted 5 days compassionate leave.

After the 5 days had elapsed, several calls were made to you in regards to your responses on the burial arrangements and you mentioned that the burial will not take place until your brother's examination is over. Several calls were made to you again as we expected you to have made the arrangements at your home town and report back to work.

On 22nd November another call was made in regards to you reporting to work but you said that you will bury your father on 9th December, after which religious and church formalities will follow. You have been away for more than a month without written permission or leave form filled. Furthermore, you have exhausted your annual leave and compassionate days.

In view of the above, you were asked to respond in writing, by 12th November 2016, of your absence from work. The deadline of the response has expired and you have failed to give us your explanation on the same matter.

It is in this respect that you leave management with no option but to summarily dismiss your services with immediate effect from 15th December 2016 for violating the terms of your employment and the Employment Act Section 44, (4) clause (a).

By copy of this letter you are expected to clear with the school to enable us calculate your final dues.

We wish you all the best in your future endeavours.

Yours sincerely,

(signed)

JACKLINE AMING'A

HEAD OF SCHOOL."

28. According to this letter, the Claimant's employment was terminated on account of unauthorised absenteeism. That the Claimant was absent from work between 4th November 2016 and 20th December 2016 is an uncontested fact. What is in contention is whether or not the absence was authorised.

29. According to the Claimant, when the Respondent allowed him to go home on 4th November 2016, following the death of his father, there was an agreement that he would resume duty after the burial. The Respondent however maintains that the Claimant was only allowed to proceed on 5 days' compassionate leave and any extension was unauthorised.

30. None of the parties provided any documentary evidence to support their position regarding the Claimant's absence. It would appear therefore, that the absence was undocumented.

31. In its decision in *Thomas Dzombo Kirunga v Krystalline Salt Limited [2020] eKLR* this Court held that an employee who is absent from work is under an obligation to notify the employer of the reason for absence and seek permission for extension of absence. It is not

enough for an employee to assume the employer is aware of the employee's predicament.

32. In the present case, the Claimant was away from work for more than a month and it was therefore incumbent upon him to reach out to his employer and to formally seek whatever support he needed. Instead, it was the employer who sought out the Claimant and even went ahead to issue a show cause letter, to which the Claimant did not respond within the required time.

33. Even taking into account the Claimant's predicament, he pushed his luck too far and this Court finds no reason to fault the Respondent for the decision taken to dismiss the Claimant. In the submissions filed on behalf of the Claimant on 6th August 2021, a suggestion was made that the Respondent ought to have recovered the days of absence from the Claimant's salary, instead of terminating his employment. This submission is pegged on a clause in the Claimant's employment contract providing for forfeiture of pay for the period of unauthorised absence, which the Respondent had previously invoked.

34. In its decision in *Lake Victoria North Water Services Board & another v Alfred Odongo Amombo [2018] eKLR* the Court of Appeal restated the principle that courts should be wary of usurping the employer's decisional function and thereby imposing its own abstract decision on workplace disciplinary processes. This is the essence of Section 43(2) of the Employment Act which provides:

(2) The 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.

35. What the Court is required to do is to ask whether the employer acted reasonably in the circumstances of the particular case, always bearing in mind that the Court itself does not necessarily hold the plumb line for reasonableness in this regard.

36. In the circumstances of this case, I find and hold that the Respondent acted reasonably and there was therefore a valid reason for terminating the Claimant's employment, as required under Section 43 of the Employment Act.

37. But the Claimant argues that even if the Respondent had a valid reason for the termination, it failed the procedural fairness test set by Section 41 of the Act. In its decision in *Jackson Butiya v Eastern Produce Kenya Limited (Cause No 335 of 2011)* this Court held that an employee who squanders the grievance handling mechanism availed by the employer cannot come to court and complain that they were not heard.

38. By failing to respond to the show cause letter as required by his employer, the Claimant effectively placed himself outside the procedural fairness safeguards provided by Section 41 of the Employment Act. He cannot therefore turn around and accuse the Respondent of breaching those very provisions. That settles the issue of procedural fairness.

39. Overall, the Claimant has failed to prove a case of unlawful or unfair termination of employment. The claims for compensation and notice pay are therefore without basis and are disallowed.

Other Claims

40. The Claimant also claims leave pay for 7 years. According to the evidence on record however, at the time of leaving the Respondent's employment, the Claimant had exhausted all his leave. This claim is therefore misplaced.

41. No basis was laid for the claim for gratuity which also fails.

42. In the end, the Claimant's entire claim fails and is dismissed.

43. Each party will meet their own costs.

44. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OCTOBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

MISS ONYANGO FOR THE CLAIMANT

MRS. KATISYA FOR THE RESPONDENT