



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 618 OF 2017

MOHAMMED ALI IDDOW.....CLAIMANT

VERSUS

HIGHLAND RESOURCES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant instituted the instant claim through which he claims that he was unlawfully terminated by the respondent upon sustaining injuries and while he was still recuperating. He sought the following reliefs;

- a) Salary from September, 2016 upto March 2017 at Kshs 15,000/= per month.
- b) 3 months gross salary in lieu of notice.
- c) Unpaid leave days for 3 years.
- d) Remedies for wrongful and unfair termination.
- e) Severance pay for 3 years.
- f) NSSF contribution.
- g) Recommendation letter.

2. The respondent opposed the claim through its memorandum of response dated 22nd May, 2017 wherein it admitted that the claimant sustained injuries in the month of February, 2016 but avers that he sustained the said injuries when he had left work without obtaining the requisite permission. It further denied ever dismissing the claimant from employment. The respondent also averred that the claimant was paid salary upto September, 2016 and a further advance salary of 3 months which was paid to him upto the month of December, 2016. The respondent prayed that the claim be dismissed with costs.

3. The matter proceeded for hearing on 9th August, 2021 and each side called one witness.

Claimant's case

4. The claimant testified as CW1 and sought to rely on his witness statement and bundle of documents which he produced before court as exhibits. He prayed that the court adopts the same as part of his evidence in chief.

5. It was the claimant's testimony that he was employed by the respondent as a security guard from February, 2014 or thereabout and was earning Kshs 15,000/= prior to his termination. He testified that he worked diligently until 5th September, 2016, when the respondent terminated his services.

6. The claimant stated that it was around this time that he had been involved in an accident along Ngurunga road. He claimed that he sustained serious injuries out of the said accident thus necessitating admission in hospital for 2 months. It was his testimony that upon discharge, the doctor advised him to recuperate until he could get on his feet. That it was after six months when he fully recovered and could get on his feet, hence he reported to work sometimes in March, 2017 only to be told that someone else had taken his place.

7. He told court that he was never taken through a disciplinary process, nor issued with a termination letter prior to. He also stated that he was never paid any terminal dues by the respondent at the time he was terminated. He thus averred that he was unfairly dismissed hence

prayed for compensatory damages amongst other prayers in his statement of claim.

8. In cross examination, the claimant admitted that he was not issued with a letter authorizing him to be on sick off and that the doctor only advised him to recuperate at home and to report back to work once he had fully recovered.

Respondent's case

9. The respondent called one witness, who testified as RW1. At the outset, he sought to rely on his witness statement which he sought to adopt as part of his evidence in chief. He also produced the bundle of documents filed on behalf of the respondent as exhibits before court. RW1 informed court that he worked with the claimant at the respondent's quarry.

10. RW1 averred that sometimes on 5th September, 2016, he was informed that the claimant had been involved in a road traffic accident at Ngurunga, while outside employment and at a time when he had left his work place without the requisite permission. That the vehicle the claimant was travelling in, did not belong to the respondent. That upon receiving this information, they organized for the claimant's transfer from Kitengela hospital where he was initially admitted, to Mbagathi Hospital for further treatment.

11. That the claimant was later taken to Kikuyu hospital where he was admitted. It was his testimony that the claimant never notified the respondent when he was discharged from hospital. That he only got to know of the claimant's discharge by chance, when he randomly called the hospital to enquire of the claimant's medical condition. It was therefore his testimony that the claimant absconded duty as he never reported back to duty upon being discharged from hospital. That the respondent paid the claimant's salary when he was unwell all the way upto December, 2016. It was also his testimony that the respondent cleared the hospital bills incurred by the claimant. He asked the court to dismiss the claimant's case.

12. During cross examination, RW1 stated that he admitted not issuing the claimant with any letter on account of desertion of duty.

Submissions

13. Both parties filed written submissions. The claimant submitted that his termination was not in line with the requirements stipulated under the Employment Act. He specifically submitted that the respondent did not have a valid reason to terminate his services.

14. He submitted that his services were terminated while he was on sick leave which in itself was unfair in terms of section 43(1) of the Employment Act. In support of his submissions, he cited the case of **Kennedy Nyangucha Omanga vs Bob Morgan Security Services Limited (2013) eKLR**. He further submitted that the respondent did not tender any proof to demonstrate that the claimant would be unable to continue rendering any services. Hence the termination was without justifiable reason. The claimant further submitted that the respondent did not accord him procedural fairness when it effected his termination. That this was contrary to the provisions of section 45 (2) (c) of the Employment Act.

15. On its part, the respondent submitted that it was considerate of the claimant's plight as it facilitated his transfer to hospital and ensured that he received the necessary treatment. That it even settled the claimant's medical bills. The respondent further submitted that the claimant was requested to resume duty on 17th December, 2016 but he failed to heed this directive hence was absent from work without leave. That it was not possible to reach the claimant and take him through a disciplinary hearing as he did not respond to the communication dispatched to him. To buttress its submissions, the respondent sought reliance on the case of **GMK vs Kenyatta National Hospital (2020) eKLR**.

16. The employment relationship is not disputed. It is also not in dispute that the claimant sustained injuries and was admitted in hospital. It is the events thereafter that are in dispute.

Analysis and Determination

17. From the pleadings on record, the documentary evidence, oral testimony before court and the parties' submissions, the issues falling for the court's determination are;

- a) **Whether the respondent had justifiable cause to terminate the claimant?**
- b) **Whether the claimant was accorded fair hearing prior to termination?**
- c) **Whether the claimant is entitled to the reliefs sought?**

Whether the respondent had justifiable cause to terminate the claimant?

18. **Section 43(1)** of the Employment Act requires an employer to prove reasons for termination of an employee's services and failure to do so, such termination is deemed to be unfair.

19. Additionally, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.

20. The claimant has alleged that his services were terminated while he was still recuperating from his injuries. On the other hand, the respondent avers that the claimant refused to report back to work upon being requested to do so, and which was after confirmation that he

had indeed been discharged from hospital. The respondent thus states that the claimant was terminated from employment on account of absconding of duty.

21. It is not in dispute that the claimant sustained injuries on 5th September, 2016 and was admitted in hospital. He produced a medical report dated 4th October, 2016 which indicated the extent of his injuries and his medical status at the time.

22. Under **Section 30 (1) of the Employment Act**, an employee is entitled to sick leave of at least 7 days with full pay and thereafter, to sick leave of 7 days with half pay, subject to production of the requisite certificate of incapacity to work signed by a duly qualified medical practitioner.

23. More importantly, **subsection (2) of section 30** provides that **“For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.”**

24. As stated herein, it is not in dispute that the claimant was in hospital and hence could not attend to his normal duties. However, the claimant avers that he was still recuperating at home while the respondent avers that it was not aware of his whereabouts, having ascertained that he had been discharged from the hospital.

25. The Act has placed a burden on the employee to notify the employer of the reasons for his absence in order to be entitled to sick leave. In this case, the claimant did not state that he applied for the sick leave nor notified the respondent of the need for him to continue recuperating at home. Indeed, he has not attached any evidence to indicate that he forwarded the medical report to the respondent so as to apprise him of his health condition.

26. As the employee in this case and the one in need of the sick leave, it was his duty at all times to keep the respondent posted as regards his medical condition and his readiness or otherwise, to resume duty. It was a grave error on his part to assume that since the respondent was aware of his injuries and hospitalization, then it was not necessary to apply for sick leave. In any event, sick leave cannot be indefinite, it is subject to periodical medical reviews, an attendant medical report and sick sheet duly signed by a certified medical practitioner. The claimant did not prove that he had done any of this, hence he acted imprudently in the circumstances.

27. The respondent having failed to receive any application for sick leave from the claimant and moreso, a report from a certified medical practitioner, availed it the grounds and cause to take disciplinary action against him for desertion of duty.

28. Having determined that the respondent had justifiable cause to terminate the claimant’s services, the next issue for determination is whether it accorded the him procedural fairness prior to terminating his services.

Whether the claimant was accorded fair hearing prior to termination?

29. The claimant averred that prior to his termination, he was not accorded procedural fairness. Procedural fairness is broadly stipulated under section 45 (2)(c) and 41 of the Employment Act. It requires an employer to notify an employee of the reasons it is considering terminating his services. Such reasons ought to be communicated in a language the employee understands and in the presence of another employee or a shop floor union representative.

30. In this case, the respondent having had reasons to commence disciplinary action against the claimant, ought to have notified him of the same in writing and in a language, he understands. The respondent did not tender any evidence before court to prove that it indeed notified the claimant of such reasons.

31. Besides, the respondent ought to have granted to the claimant an opportunity to explain to him the reasons it was considering terminating his services. There was no evidence placed before court to prove that this was ever done.

32. In fact, since the parties were in an employment relationship, the respondent ought to have used the established channels of communication to reach the claimant and notify him of its intention to take disciplinary action against him. There is no evidence that it attempted to do this.

33. In view of the foregoing, it is apparent that despite the fact that the respondent had justifiable cause to terminate the claimant, it did not comply with the laid down statutory provisions constituting procedural fairness.

34. Having established reasons to justify the termination of the claimant, the respondent as an employer had all the right to take disciplinary action against him subject to compliance with the requirements of fair hearing. Having failed to do this, the respondent is at fault for non-compliance with procedure.

35. Having so found, what then are the reliefs available to the claimant?

Reliefs

36. The claimant has sought various reliefs against the respondent namely, salary from September, 2016 upto March 2017, 3 months gross salary in lieu of notice, unpaid leave days for 3 years, remedies for wrongful and unfair termination, severance pay for 3 years, NSSF contribution and a recommendation letter.

Salary from September, 2016 upto March 2017

37. The claimant has alleged that he was not paid salary with effect from September, 2016 up until March, 2017 when his services were terminated. This was the period the claimant alleges to have been sick. As stated herein, he did not notify the respondent of the reason for his continued absence from work. Coupled with this, he did not apply for sick leave as required by law. On its part, the respondent has adduced evidence to prove that it paid the claimant’s salary upto December, 2016. The claimant did not present evidence to rebut the assertions of the respondent, hence he has not justified this prayer and consequently, the same is denied.

Unpaid leave days for 3 years

38. The claim for this relief has not been supported by the necessary documentary evidence. The claimant did not produce any evidence to prove that it applied for leave and that the same was denied. In absence of the necessary proof, the claim under this head fails.

Severance pay for 3 years

39. This claim is irrelevant as the same is payable only in cases where termination was by way of redundancy pursuant to section 40 of the Employment Act. This does not apply to the case herein hence this prayer is therefore denied.

3 months gross salary in lieu of notice

40. Section 44(2) of the Employment Act, prohibits an employer from summarily dismissing an employee without notice or with less notice. On its part, section 35 (1) (c) of the Act provides for a mandatory one month notice where an employee is on a monthly salary as the claimant herein. Having found that the claimant’s termination was not in line with fair procedure, I will award him 1 month salary in lieu of notice. The prayer for 3 months’ gross salary in lieu of notice has not been justified by way of an employment contract stipulating as much.

Compensation for wrongful and unfair termination

41. As I have stated herein, the claimant acted imprudently by not notifying the respondent of his intention to proceed on sick leave. Further he failed to update the respondent of the need for his continued absence from work. He stayed away from work and assumed his employer knew the reason for his absence. On its part, the respondent also erred in not complying with the requirements of fair process. On this account and considering that the respondent had valid reason to terminate the claimant, I will award him two (2) months' gross salary in compensation as damages under this head.

NSSF contribution

42. This will be deducted from the claimant’s final award and remitted as appropriate.

Recommendation letter

43. This is provided for under section 51(1) of the Employment Act as “certificate of service” hence I find that the claimant is entitled to the same as the employment relationship was well over 4 consecutive weeks and has not been disputed.

Conclusion

44. In conclusion, I enter Judgment in favour of the claimant against the respondent in the following terms;

One month’s salary in lieu of notice	15,000.00
Compensation equivalent to 2 months’ gross salary	30,000.00
Total	<u>45,000.00</u>

45. The respondent shall also bear the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Nyabena

For the Respondent Mr. Athuok

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