



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT NAIROBI**

**CAUSE NO.1119 OF 2015**

**BAKERY, CONFECTIONERY FOOD MANUFACTURING**

**AND ALLIED WORKERS UNION .....CLAIMANT**

**VERSUS**

**NORDA INDUSTRIES LIMITED.....RESPONDENT**

**J U D G M E N T**

1. The dispute before the court arises from termination of employment contract between a member of the Claimant and the Respondent on ground of absenteeism. By memorandum of claim dated 26<sup>th</sup> June 2015 the Claimant, on behalf of its member sought the following reliefs:-

- a. A declaratory order that the purported summary dismissal of the grievant is unlawful and illegal ,
- b. An order for the immediate and unconditional reinstatement of the grievant into his former employment without loss of pay and benefits,
- c. An order for the immediate and unconditional re- engagement of the grievant in work comparable to that which he was employed prior to his unlawful dismissal or other reasonably suitable work at the same wage without loss of pay benefits and /or seniority,
- d. In the alternative and without prejudice to paragraph B and C above, the grievant be paid his termination dues for unlawful termination including, notice pay, payment of unpaid salary/wages, house allowance, annual leave, travelling allowance and all other benefits due and owing as at the time of termination and /or accrued in accordance with the Collective Bargaining Agreement,
- e. Payment of his full and rightful wages and benefits for the time which he was out of employment on account of the purported summary dismissal,
- f. Maximum compensation for unlawful termination of employment pegged at 12 months gross salary.

2. The Claimant filed together with the claim, a verifying affidavit dated 26th June 2015. In the affidavit issues in dispute are stated to be, '**victimization and unlawful summary dismissal of Joshua Manono by the company**', annexed to the affidavit is a bundle of documents marked as **appendix 1- 18**. The Claimant filed a witness affidavit of Joshua Manono, the Grievant, dated 24<sup>th</sup> September 2020.

3. The Respondent entered appearance through the Federation of Kenya Employers dated 27<sup>th</sup> July 2015. The Respondent's memorandum of response is dated 7<sup>th</sup> October 2015 annexing one document marked as Appendix 1. The Respondent filed witness statement of Betty Muthaura dated 3<sup>rd</sup> October 2020.

4. The case was heard inter- partes on the 11<sup>th</sup> August 2021 with each party calling one witness.

5. The Claimant's submissions are dated 15<sup>th</sup> September 2021. The matter was mentioned before the DR on the 22<sup>nd</sup> September 2021 for confirmation of the filing of the submissions and it is noted the parties were absent and that the Claimant's submissions are in record. The Respondent did not file submissions as they are not in the file.

**The Claimant's case**

6. The Claimant called Joshua Manono, the grievant, as its witness (CW). CW told the court that he was the grievant and actual claimant in the instant case. He adopted as his evidence in examination in chief his affidavit dated 24<sup>th</sup> September 2020. CW produced as evidence his bundle of documents marked appendix 1-18. CW told the court that he was not given any report at the hearing. That he was not given any document to show that the doctor who treated him is not licensed and there was no document before the court to that effect.

7. On cross examination CW told the court that he informed his employer that he was unwell through 'sms' through a mobile number given by employer to communicated to the supervisor. CW stated that he texted the supervisor. CW told the court that he was away from work for 11 days from 6<sup>th</sup> October to 17<sup>th</sup> October. CW told the court he presented 2 sick sheets. The 1<sup>st</sup> one was a letter by the doctor and 2<sup>nd</sup> one was an explanation of how he was given bed rest. CW told the court he could not recall the name of the doctor who wrote the 1<sup>st</sup> sick sheet. CW told the court that on 1<sup>st</sup> day he was examined and given sick leave for 3 days. After persistence of the sickness he was added 4 more days in total 7 days of sick off. CW told the court he was absent for 11 days. CW told the court that he participated in the hearings accompanied by a union official. He was issued with a show cause letter and he replied. He was given an invitation letter to the disciplinary hearing which spelt the right to be accompanied by a union official. He confirmed of having participated in the hearing held on the 7<sup>th</sup> November same year. He confirmed having appended his signature to the hand written minutes (claimant's appendix 11). CW told the court that he agreed with the record of the meeting where the union representative stated that employees should stick to government hospitals and that the employee be treated with leniency since he was sick (Claimant's appendix 11 last page 2<sup>nd</sup> last paragraph 2). CW stated that Isaac Otieno who was the company investigator presented a report and he questioned the findings of the report at the hearing. He stated that this was not reflected in the minutes he signed. He stated that he asked questions and they are not captured in the minutes. He told the court that he was not issued with the minutes. CW told the court that at the disciplinary hearing he was represented by union official called Mwangare and could not recall if he asked the investigator questions on the investigation. CW confirmed as true record page 3 paragraph 3 of the hand written notes to effect that he given as sick off 7 days and there were other days he was absent from work outside the 7 days. CW told the court he could not confirm whether the person who signed the sick off was not authorized. CW told the court he could not recall the doctor who signed his sick sheet. CW told the court that he was aware that the union reported the dispute to the Ministry of Labour and that he was not aware of the recommendation by the Conciliator. CW told the court that he did not appeal against his dismissal and that he was not paid his dues.

8. On re- examination CW referred the court to his Appendix 5 which is a letter to show cause with attached sick sheet indicating that from 7<sup>th</sup> to 12 October 2014 he was under injections and sick. He reported to the hospital 4<sup>th</sup> October 2014 and was given bed rest from 4<sup>th</sup> to 8<sup>th</sup> then the pain persisted and was on injections from 7<sup>th</sup> to 12<sup>th</sup>. He presented these documents in response to the show cause letter. CW stated that Isaac Otieno did not present any investigation report and presented his findings verbally. CW stated that he did not get any information that the person who examined him was not a doctor and that he was not aware whether Isaac Otieno was called as a witness. CW told the court that there was no list of recommended hospitals by the employer and had no way of knowing whether the hospital was on the list. The union official recommended they use government hospitals. He could not recall the doctor who attended to him. CW confirmed that there was a dispute at the Ministry of labour and he was dissatisfied with the decision hence the claim in court. CW told the court that the letter dated 13<sup>th</sup> November 2014 and marked appendix 13 was his appeal. Claimant's Appendix 18 are the findings of the Conciliator.

#### **The Respondent's case.**

9. The Respondent called Betty Muthaura as its only witness (RW). RW told the court that she was the Human Resources and Administration Manager of the Respondent. RW adopted her statement dated 3<sup>rd</sup> October 2020 as her evidence in examination in chief. She produced the attached document marked appendix 1 attached to the memorandum of Response. RW told the court that she joined the Respondent in May 2019 and relied on the information given as stated in paragraph 2 of her statement.

10. In cross examination by Counsel for Claimant RW told the court that her evidence is based on documents. That under paragraph 5 of her statement the grievant wrote 'sms' on his absence. RW confirmed her paragraph 6 as true. RW confirmed that they received the Grievant response to the show cause letter and the attached sick sheet (appendix 5). Appendix 8 is the suspension letter issued to the Grievant to pave way for investigations and appendix 12 is the summary dismissal letter. The letter makes reference to investigation report which was not filed in court. RW referred to the hand written minutes to say they received a report from Isaac Otieno the investigator. RW stated that the doctor who treated the Grievant was called Patrick and she did not know of other name. RW told the court there was no document before the court that bears the name Patrick. RW was referred to appendix 11 Minute 3 and told the court that they do not have a letter to show that the doctor who treated the Grievant was not a registered practitioner nor did they have a document to show that the Grievant did not go to the health facility. RW told the court that they have recommended for employees Avenue Hospital and that from one of the document's the Grievant refers to Avenue Hospital meaning he knew he was to seek services from that hospital. RW confirmed there were no documents to show that the medical treatment notes and sick sheets under appendix 5 were by unauthorized person. RW confirmed that the Respondent did not explore the option provided under appendix 2 page 10 of the CBA Clause 27 (d) to deduct unauthorized days of absence.

11. On re-examination by Counsel for Respondent RW told the court that the Grievant produced sick sheets which did not cover all days he was absent. The sick off sheet does not indicate the name of the doctor who signed it or the number of the medical practitioner. The letter dated 12<sup>th</sup> October 2014 indicated that the Grievant was put on 3 day bed rest from 4<sup>th</sup> to 8<sup>th</sup> October, on review on 7<sup>th</sup> October he had not improved and was put on injections from 7<sup>th</sup> October to 12<sup>th</sup> October. The said letter addressed to whom it may concern and bearing the title of Modern Healthcare states that on completion of treatment the author who is not disclosed states he gave him 4 day bedrest of recovery under his observation (on phone call follow up ) as from 13<sup>th</sup> to 17<sup>th</sup> October. In the hand written minutes (exhibit appendix 11 of Claimant's documents) it is recorded that ***'Mr. Mwangare the union representative confirmed that the document presented by the employee was questionable'*** as reflected at page 4 of the hand written minutes. RW stated that the employer had reasons to believe that the sick off was not valid for lack of name and number of the doctor. RW stated that at paragraph 3 of the last page of the hand written minutes the union representative appealed for humanity for the Grievant. RW told the court Isaac Otieno took the hearing through the report as captured in paragraph 1 of page 2 of the hand written minutes. RW told the court that there was no record in the minutes where the union representative requested to be shown the report or indicated there was no investigation report presented. RW confirmed that the conciliator upheld the dismissal of the claimant. RW told the court there was no appeal on dismissal by the grievant to the employer.

## Legal analysis and findings

12. The Claimant identified the following as issues for determination in the document filed in court on 20<sup>th</sup> June 2015 under the verifying affidavit to be :- **'Victimization and unlawful summary dismissal of Joshua Manono by the company'**

13. The Claimant in their submissions identified the following as the issues for determination:-

- i. Whether the Grievant's termination by way of summary dismissal was unfair, illegal, null and void?
- ii. What remedies are available to the Claimant?
- iii. Who should bear the cost of the proceedings?

The Respondent did not file any issues for determination.

After carefully analyzing the Claimant's list of issues and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons for termination
- ii. Whether the procedure for termination of employment was fair and lawful
- iii. Whether Grievant is entitled to reliefs sought.

14. The Court addressed the issues as follows:-

### Whether there were valid and justifiable reasons for termination

15. The Grievant was dismissed from employment for absenteeism. That was the ground given by the employer for the dismissal. The letter of dismissal (exhibit 12 of the Claimant's documents) states the employee was terminated for absenteeism from 6<sup>th</sup> to 17<sup>th</sup> October 2014 and that the sick sheets presented were not by an authorized medical practitioner. The Claimant on behalf of the Grievant submits that the Respondent did not present evidence that the medical note was by a person not authorized. The Grievant testified that he was away for 11 days from 6<sup>th</sup> to 17<sup>th</sup> October. That he presented two sick sheets to the employer. He told the court he could not recall the doctor who wrote the sick sheet. The Grievant told the court that on 1<sup>st</sup> day he was examined and given 3 days' sick leave. The Grievant told the court due to persistence of the sickness he was added 4 days sick off under 2<sup>nd</sup> sick sheet. He admitted he was absent for 11 days. At page 3 of Minute 3 of the handwritten minutes of the disciplinary meeting (Document marked as exhibit 11 in Claimant's bundle of documents) the Grievant admitted that he was given sick off for 7 days and that the other days he had no sick off. The sick sheets are under exhibit 5 of the Claimant's documents and dated 4<sup>th</sup> October 2014 and 7<sup>th</sup> October 2014 respectively. There is also annexed a letter **'to whom it may concern'** dated 12<sup>th</sup> October 2014 from the same medical facility on the treatment. The total number of authorized sick off days amount to 7 days. The Grievant in his submissions paragraph 4.14 submits that the Claimant's exhibit 5 is a response on the absenteeism and submits that on the medical report dated 12<sup>th</sup> October 2014 confirms the dates, nature of treatment and days when Grievant was put on medical rest. The said document is titled to who it may concern. The second paragraph it is written, **'on completion of treatment ...was still weak and on my view I gave him a 4 day bedrest as recovery period under my observation (on phone call follow -up) as from 13<sup>th</sup> -17<sup>th</sup> and that is the explanation to the** (some words not clear)..**in the letter. Thanks in advance dated 12<sup>th</sup> October 2014** and signed in a way that almost resembles the other sick sheets. The court notes that in sick sheet of 7<sup>th</sup> October the Grievant was put on 4 day bed rest. There appears to be an insertion of 13<sup>th</sup> October -corrected date of 17<sup>th</sup> October 2014 after a full stop. The court finds that 13<sup>th</sup> to 17<sup>th</sup> is outside the 4 days from 7<sup>th</sup> October thus irrelevant and misplaced. The four days would have been 7<sup>th</sup> -12<sup>th</sup>. The court finds the insertion suspect and believes that it was inserted by the undisclosed author of the letter of 12<sup>th</sup> October 2014 in attempt to justify the absence. Bed rest for 4 days from 7<sup>th</sup> takes one to 12<sup>th</sup>. In comparison letter of 4<sup>th</sup> October the 3 days bed rest are counted to start from date of the letter. Section 30 (1) of the employment Act provides that **'30(1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.'**

The court finds that the letter dated 12<sup>th</sup> October 2014 does not qualify as a certificate of incapacity to work. The court finds the letter of 12<sup>th</sup> October 2014 is not credible, is not a certificate and is of no weight to the case.

**Section 44(a) of the Employment Act provides as a justifiable or lawful ground for summary dismissal if without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work.**

The court, on weighing the evidence on a balance of probabilities the court finds that it is true Grievant was absent from work outside the 7 days he had obtained written sick off sheets notwithstanding even these notes were disputed by the employer. The court takes cognizance that the notes were availed after issuance of notice to show cause hence the employer had basis to question their authenticity. There was no prove that the notes issuing bed rest for total of 7 days were a forgery. From the foregoing analysis of the evidence it is evident the Grievant did not explain his absence from 13<sup>th</sup> to 17<sup>th</sup> dates with sick off certificate as required by law. Indeed the case cited in submissions by the Grievant of **Kipkebe limited v Pterson Ondieki Tai**(2016) which cited Nairobi HCC.NO.332 of 1993 it is trite law that he who alleges must prove. The Grievant alleges he was on sick leave but was unable to prove on balance of probabilities the days he was absent outside the 7

days were authorized by a medical practitioner. The employee was absent more than the 7 days without authority of the employer. This issue is raised by the employer in the suspension letter (appendix 8 of the Claimant's documents). Employee absenteeism without authority is a valid ground of termination of employment. The court finds that the Employer/ Respondent had a valid and lawful ground to dismiss the Grievant from employment.

#### **16. Whether the procedure for termination of employment was fair and lawful**

The Grievant submits in paragraph 4.16 that the procedure adopted by the Respondent though meeting all other thresholds was vitiated by fact that the Grievant was not furnished with investigation report. I have already found there was a valid reason to terminate the employment.

The Employment Act section 41 (2) provides the threshold of procedural fairness as follows:-

***'(1) subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***Notwithstanding any other provision of this part, an employer shall before terminating the employment of employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation's which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make'.***

The *Court of Appeal in Postal Corporation of Kenya v Andrew K. Tanui (2019)* where the court pronounced itself on procedural fairness as herein under:-

***'...four elements must thus be discernable for the procedure to pass muster:***

- i. An explanation of the grounds of termination in a language understood by the employee;***
- ii. The reason for which the employer is considering termination***
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and***
- iv. Hearing and considering any representations made by the employee and the person chosen by the employee...'***

In the instant case, The Grievant was issued with a show cause letter (Exhibit 4 of the Claimant's documents) where it is explained the reasons the employer was considering action against him. The Grievant responded to the letter (exhibit 5). The employer did not find the explanation satisfactory and issued a suspension letter to the Grievant (appendix 8 of Claimant's documents), the Grievant was issued with a letter of invitation to the hearing dated 25<sup>th</sup> October 2014 indicating date and venue of hearing and the right to be accompanied by a work colleague or trade union representative which letter was copied to the Union (exhibit 9 of the Claimant's documents), the typed and handwritten proceedings of the hearing were produced by the Grievant in exhibits 11. The handwritten minutes are signed by the Grievant and the Union representative identified in the minutes as Mr. D.C Mwangure. A perusal of the handwritten minutes signed by all the parties the representation of the union representative are recorded. The Grievant was dismissed after the hearing on ground of absenteeism. The Claimant states that the process was tainted for the reason that the Grievant was not furnished with the investigation report at the hearing. The court notes that the Claimant's representative accompanying the Grievant to the hearing interrogated the investigator identified as Isaac on the report. There is no record of the representative asking for the report. To buttress his position the Grievant cites the case of *Peter Wangai v Egerton University (2019) eklr* which the court has considered. The case is distinguishable for the instant case. The findings in paragraphs 98 and 99 of the decision are that the court found the process flawed as the hearing was held in absence of the claimant whose notice gave different time of the meeting. The claimant in that case was invited for a meeting to be held at 8.30 am and learnt that the meeting took place at 2 pm. In the instant case, unlike the *Peter Wangai case* there is no lapse in the hearing procedure as outlined by the Court of Appeal above.

The court is satisfied that the process the Claimant was subjected to before termination of employment was fair and lawful and the claim raised of investigation report not having been furnished to the Grievant is tantamount to an afterthought claim. Its representative was present at the hearing when the investigator identified as Isaac took the team *'through his prepared report..'* as reported in the hand written minutes produced in court by the Claimant (exhibit 11). The court is satisfied that the process was fair and fully complies with the criteria set out above by the Court of Appeal in the *Postal Corporation of Kenya Case*.

The Claimant being aggrieved by the process and outcome notified the Cabinet secretary of a trade dispute dated 24<sup>th</sup> November 2014. In the notice issued by the General Secretary of 24<sup>th</sup> November 2014 it is written, inter alia, 'the matter over which the dispute has arisen being:- **'victimization on account of trade union activities and wrongful dismissal of Joshua Manono Okindo by the company'** (Exhibit 15 of the Claimant's documents).

The trade dispute was submitted to a Conciliator vide a letter dated 17<sup>th</sup> December 2014 with the parties being requested to submit in writing their proposals for consideration (Exhibit 16 of the Claimant's documents).

The appointed conciliator J.M Kiraguri considered invited the parties to the conciliation meeting vide a letter dated 4<sup>th</sup> March 2015. (Exhibit 17 of the Claimant's documents). The conciliator J.M Kiraguri issued his verdict dated 7<sup>th</sup> May 2015 (Exhibit 18 of the Claimant's

documents).

Part of the Conciliator’s report states; ‘ *the union maintained that Joshua Manono’s dismissal was nothing but a mechanism to frustrate the activities of the union and its members. The management on the other hand maintained the employee was summarily dismissed for absenteeism without permission. However, investigations revealed that the employee(s) involved in the dispute was absent from his proper place of employment from 6<sup>th</sup> October to 17<sup>th</sup> October 2014. The medical documents produced were invalid and could not explain his absenteeism for the days referred above. In the circumstances s the management acted lawfully and the union demand for reinstatement is unattainable. However, he be paid all his payable dues upto the date he disappeared from his place of work.*’

Conciliation is a lawful alternative dispute resolution under section 62 of the Labour Relations Act. The issues raised are of victimization of the member of the union. The issue of the investigation report not having been furnished are not raised. This is consistent with my finding that the Claimant who participated in the hearing and asked the investigator questions on his report on behalf of the Grievant and in the conciliation process represented the Grievant is raising issue of the report as an afterthought. I find that the Claimant is fishing for grounds to challenge the process in raising the issue of the investigator report late in the day.

In conclusion, considering the foregoing analysis of facts and my findings, I find that the process of terminating the Grievant by the Respondent was fair and lawful.

**Is the Grievant entitled to the relief sought ?**

Considering the finding that the reasons for termination was valid and the process for termination was fair and lawful the Claimant is not entitled to the reliefs sought being terminal dues for unlawful termination.

**CONCLUSION AND DISPOSITION**

- 17. I have found that the termination of the Claimant’s employment contract by the Respondent was fair and lawful.
- 18. I dismiss the entire claim. The Claimant was acting for a member who has since been terminated from employment. Each party to bear own costs.

**WRITTEN AND DATED THIS 2ND DAY OF NOVEMBER 2021 AT BUNGOMA.**

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**J.W. KELI**

**JUDGE**

**DELIVERED AND DATED THIS 2ND DAY OF NOVEMBER 2021 AT NAIROBI.**

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**JUDGE**