



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE 416 OF 2014**  
**(Before Hon. Lady Justice Maureen Onyango)**

**STEPHEN ODUOR NDEGE..... CLAIMANT**

**VERSUS**

**RILEY SERVICE LIMITED .....RESPONDENT**

**JUDGMENT**

The Claimant, Stephen Oduor filed this claim vide a Statement of Claim on 19<sup>th</sup> March 2014, for unlawful termination against the Respondent. He avers that he was employed as a casual employee by the Respondent in September 1993 and subsequently became a permanent employee from 1<sup>st</sup> December 1994. That he had proceeded on leave from 5<sup>th</sup> September 2012 and was expected to report back on 5<sup>th</sup> October 2012 but he fell sick and was treated at Khyunyangu sub-district hospital. He could not therefore report to work as was expected. That he subsequently reported back to work on 17<sup>th</sup> November 2012 and was given a letter of dismissal terminating his services with effect from 5<sup>th</sup> October 2012 on grounds of absconding duty and failing to communicate his whereabouts. That contrary to the allegations in the dismissal letter, the Respondent had by a letter dated 30<sup>th</sup> November 2012 confirmed that he had indeed lodged a report to the control room on 5<sup>th</sup> October 2012.

He avers that the Respondent instructed him to appeal against the dismissal which he did by a letter dated 22<sup>nd</sup> November 2012 but that his appeal was rejected following the Managing Director's allegations that the Claimant had not explained the entire period of absence. He contends that he further availed medical documentation to confirm his medical status but the Respondent ignored the same. That by a letter dated 8<sup>th</sup> April 2013, the hospital where he was treated confirmed he had been undergoing treatment for recurrent chest ailments from 5<sup>th</sup> October 2012 to 16<sup>th</sup> November 2012. He avers that his services were terminated in a predetermined case while he was still receiving treatment and that requiring him to appeal was intended to justify the Respondent's initial process. He also contends that the appeal could not operate retrospectively to cure the defects arising from the unprocedural dismissal. That the Respondent's actions amounted to unlawful termination which denied him his livelihood.

The Claimant further avers that he was not issued with any notice to terminate his employment or accorded any notice prior to hearing. That the purported appeal was a cover up by the Respondent for the deficiencies in its disciplinary process.

The claimant avers that at the time of termination, he was earning a salary of Kshs.23,791. That as a

result of the dismissal, he has lost his terminal dues which he claims as follows:

- a) Payment in lieu of notice being Kshs.15,939.75
- b) 12 months' compensation for unlawful termination being Kshs.191,227.00

That despite making a demand to the Respondent to make good the claim, it has neglected and/or refused thus necessitating the lodging of this Claim. He prays for judgment against the Respondent for:-

1. A declaration that the termination of the Claimant's employment by the Respondent was unlawful.
2. Compensation of Kshs.207,216.00 for unlawful termination and loss of employment.
3. An order for payment of costs for this claim.
4. Any relief the court may deem fit.

The Respondent filed its Statement of Response dated 13<sup>th</sup> August 2014 admitting that it employed the Claimant as a Security Guard on casual basis. It avers that in the course of his employment, the claimant received several warnings and cautions for misconduct such as being found asleep during night duty. That the Claimant has also in the past absented himself from duty without permission, conduct for which he received a warning letter dated 4<sup>th</sup> March 2008. That even though the Claimant called its control room on 5<sup>th</sup> October 2012 to explain his inability to report to work on that day, no report was made on subsequent days as evidenced in the occurrence book for the period 5<sup>th</sup> October 2012 to 16<sup>th</sup> November 2012. That it thus summarily dismissed him vide a letter dated 31<sup>st</sup> October 2012. That when he resumed duty on 19<sup>th</sup> November 2012. He purported to explain his absence through a letter dated 19<sup>th</sup> November 2012. That he had been given 3 days and a further 4 days sick leave from 5<sup>th</sup> October 2012 and 8<sup>th</sup> October 2012 respectively by a doctor. That the Claimant orally informed it that he had called the control room on 5<sup>th</sup> and 10<sup>th</sup> October 2012.

The respondent further avers that it reviewed the Claimant's explanation, treatment notes and occurrence book and was satisfied that it had a valid reason for being away but had not explained his absence for the period between 12<sup>th</sup> October 2012 to 19<sup>th</sup> November 2012. That consequently, the date of his summary dismissal was varied to be from 13<sup>th</sup> October 2012 and his dismissal upheld with that variation. The respondent contends that the letter received from the Ministry of Medical Services dated 8<sup>th</sup> April 2013 was an afterthought. That the Claimant reported a dispute with the Ministry of Labour and the officer seized of the dispute asked for the respondent's comments by a letter dated 7<sup>th</sup> December 2012 which it duly gave. That the labour officer subsequently invited parties for a conciliation meeting on 3<sup>rd</sup> January 2013 which was attended by its representative. That the labour officer's conclusion was that the Respondent had not breached the law. The Respondent prays for the Claim to be dismissed with costs.

### **Evidence**

The Claimant in his testimony referred to *App 1 of Response* which he stated was his letter of permanent employment and to *page 9 of Claimant's bundle* being the letter of summary dismissal. He stated that he reported back to work on 11<sup>th</sup> November 2012 and was told to appeal. That he explained he had been told by controller to get well and report back to work which is what he did yet he got a letter of summary dismissal upon his return. That he had a book containing treatment records but which was not accepted as it had no stamp of the doctor. That his last salary was almost Kshs.15,000. He referred to his *payslip for July 2012 at page 11 of the Claimant's bundle*.

Under cross-examination, he stated that the labour officer did not tell him he had no case but told him to go to a lawyer.

In re-examination, he stated that the letter from the hospital that he submitted in 2013 was required by the labour office.

RW1, MARY ONDISA ONYAGI who is the Respondent's Human

Resource Manager testified that the Claimant made a Second Appeal in which he apologised for his absence. That the conciliator dismissed the Claimant's case after going through all the documents and that they then subsequently received a letter from the Claimant's lawyer and from Kituo Cha Sheria which they responded to. She testified that the letter dated 8<sup>th</sup> April 2013 which they received from the hospital had been written by a clinical officer and not a doctor and that they did not have the said letter at the time of dismissal of the Claimant. Under cross-examination, she confirmed that they did not call the Claimant for disciplinary hearing and that they are ready to pay him from 5<sup>th</sup> to 12<sup>th</sup> October 2012. She also confirmed that they did not call the hospital to confirm the authenticity of the letter they received. In re-examination, she confirmed that the leave was paid in advance before the Claimant went on leave.

### **Claimant's Submissions**

The Claimant submits that the Respondent was pre-disposed to dismissing him either way because the letter dated 30<sup>th</sup> November 2012 responding to his appeal again retained and reiterated that he had been summarily dismissed with effect from 5<sup>th</sup> October 2012 and did not rectify the actual facts as per the O.B. That his dismissal was unfair as he had been away for a valid reason and was further not afforded an opportunity to justify the circumstances of his absence contrary to the provisions of **Sections 41 and 45(2)(c) of the Employment Act** on fair procedure. He relies on the case of **Wilfred Isoe Maosa –v- Masaba Hospital Limited [2018] eKLR** where the court found that where dismissal was on grounds of misconduct, it was mandatory that the employee be granted a fair hearing to enable him explain. That the court in the **Wilfred Isoe case** found that there was a valid reason for dismissal but the failure to follow process tainted the entire dismissal and proceeded to hold that the dismissal was unfair.

He submits that the Respondent as the employer alleges to have paid salary for the period he was on leave but being the keeper of records, it has failed to avail any documents to support its allegations. That he therefore prays for judgment as prayed for salary for the period he was on leave, salary in lieu of notice, compensation for unlawful dismissal and costs of this suit.

### **Respondents' Submissions**

The Respondent submits that **Section 44** of the **Employment Act** grants an employer the right to summarily terminate the employment of an employee on the grounds of misconduct and that **section 44(4)(a)** outlines the conduct of an employee that amounts to gross misconduct being; *without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work*. That the Claimant did not produce any evidence showing he was sick the rest of the days he was absent (12<sup>th</sup> to 19<sup>th</sup> November 2012) or showing he communicated with the control room on any other day apart from 5<sup>th</sup> October 2012. That the Claimant has failed to satisfy his burden of proving there was unfair termination as required under **Section 47(5) of the Employment Act**, that on that account alone this claim ought to fail.

The Respondent relies on the case of **Daniel Mueke –v- Bhogals Auto World [2014] eKLR** where the court in dismissing the claim stated:

*“17. The Claimant has not discharged the very low threshold placed upon an employee in a complaint of unfair termination by section 47(5) of the Employment Act, 2007.*

*18. It is not necessary therefore to embark on an inquiry as to whether the Respondent complied with sections 41, 43, 45 and 47(5) of the Employment Act, 2007. The question as to whether there was unfair termination of services is therefore not necessary.*

19. *But the Court observes that questions of desertion or abscondment raise difficult questions of law. The difficulty is based on a legal question of the extent, nature and scope of the protection granted to employees against procedurally unfair termination by section 41 of the Employment Act, 2007 when an employer alleges desertion or employee absconded.*”

It also relies on the case of **George Ogweno v Autolitho Limited [2018] eKLR** where the court found that the claimant having failed to prove that he returned to work to explain the reason for his absence, had not discharged the burden set out at section 47(5) of the Employment Act.

It is submitted by the Respondent that on a balance of probability, taking into account that the Claimant absented himself from the place of work in November 2012 without explanation, it would have been impossible to grant an absent employee a hearing. That even with the opportunity to appeal his dismissal, he was unable to satisfactorily explain his absence and his termination was in the end fair and justified. That since it was justified in terminating the employment of the Claimant, he is therefore not entitled to any compensation. That he also had no outstanding dues owed at the time of being summarily dismissed.

### **Analysis and Determination**

The issues for determination are whether the Claimant was unlawfully terminated from employment by the Respondent and whether the Claimant is entitled to the reliefs sought.

In the case of **Samsung Electronics East Africa Ltd v- K M [2017] eKLR** the Court observed that:

*“29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.*

*See Section 47(5) of the Employment Act. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR**. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is this right that the legislature secured under Section 41 of the Employment Act...*”

The Claimant has argued that he was summarily dismissed from employment without a valid reason while it is the Respondent's case that the Claimant did not give sufficient evidence or grounds as to why he was absent from work in November 2012. Under the Employment Act, both termination of employment and summary dismissal entail substantive and procedural fairness on the part of the employer. In this case, the Respondent summarily dismissed the Claimant without notice on the ground that he was absent from work without permission under Section 44(4)(a) of the Employment Act. While the Claimant further served the Respondent with a letter from the hospital confirming he had been attended to on the said dates in November 2012, the Respondent, as was confirmed in the testimony by RW1, did not follow up with the hospital to confirm the truth of the matter and the authenticity of their letter on grounds that the letter was written by a Clinical Officer. To that extent, the Respondent cannot purport to have dismissed the Claimant for valid reasons. An employee who is unwell cannot be expected to report to the employer on a daily basis until he gets well. Further, it did not controvert the evidence of the claimant that he was told by the control room to stay at home until he got well. The upshot is that the dismissal was not only unfair but also unjust and unprocedural.

Section 45(4) requires employers to act in accordance with justice and equity when terminating employees. This is a classical case where the employer acted unjustly to an employee who was absent for valid reason. RW1 also confirmed in her testimony that they did not call the Claimant for a disciplinary hearing on grounds that he was absent, yet the respondent produced no letter summoning the claimant for a disciplinary hearing or asking him to show cause before the decision to summarily dismiss him was made.

The Claimant is therefore entitled to compensation for the unfair termination and one month's pay in lieu of notice as prayed in the Statement of Claim. In awarding the compensation, the court has taken into consideration the long serve of the claimant from 1994 to 2014, the fact that he was dismissed for being absent for valid reason and without observance of fair procedure as provided under Section 41 of the Employment Act. I have also taken into account that he went home empty handed.

I thus award him maximum compensation of 12 months' salary at Kshs.132,093. The prayers that were not contained in the claim are rejected.

**Award**

1) One month's salary in lieu of notice Kshs.11,007.75

2) 12 months compensation Kshs.132,093

**Total Kshs.143,101**

The respondent shall pay the claimant's costs and interest from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JANUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**