



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.269 OF 2018**

**JEREMIAH OSACHI KOLWA.....CLAIMANT**

**VERSUS**

**BHOGALS AUTOWORLD LIMITED.....RESPONDENT**

**JUDGEMENT**

The claim is that on 1<sup>st</sup> November, 2010 the claimant was employed by the respondent as an administrative clerk and paid ksh.9, 000 per month. On 14<sup>th</sup> July, 2017 the claimant was issued with letter of summary dismissal from his employment and on the grounds that he had absconded duty which was not correct. There was no hearing allowed for the claimant to explain himself and or give a defence.

The claim is that the claimant's mother was sick at home in Vihiga and had gone to his head of department and informed her that he needed to visit his ailing mother. He was directed to see the operations director Mr Rajan Bhasi who directed him to the managing director who gave him verbal approval and hence he travelled home on condition that such time would be deducted from his annual leave days. To use this reasons for summary dismissal was unfair termination of employment.

The claim is for the payment of terminal dues following unfair termination of employment;

- a) Notice pay at ksh.20,890.00;
- b) Terminal benefits for work for 6 years Ksh.225,612.00;
- c) Costs and interests.

The claimant testified that he was employed as an administrative clerk in spares section from 1<sup>st</sup> November, 2010 to 14<sup>th</sup> July, 2017 and his last wage was Ksh.20, 890. His mother was sick and wanted to go home in Bungoma to take her to hospital.

He asked his supervisor who sent him to the operations director and then to the managing director who allowed him time off. It was verbal.

The managing director sent him to the human resource officer but the officer was away. The managing director allowed him to travel. The claimant had his annual leave and for one to go on leave there were forms to be filled with Augustine Mutinda so as to proceed on annual leave.

The claimant also testified that he was away for 12 days as when his mother got sick the father got shocked and died.

When he returned to work he was issued with letter of summary dismissal. This was unfair and without justification. The reasons given that he had no permission to be away is not true as the director had allowed him to go knowing at the time the human resource officer was not in the office.

The claimant also testified that he was paid for service but very little. It was noted to be ex gratia pay. The wage for April, 2018 all Ksh.38, 607 but that was due was ksh.125, 340.

The defence is that the claims made are without justification. The claimant was dismissed based on the collective Bargaining Agreement (CBA) in force at the time and dated 18<sup>th</sup> February, 2016.

Without prejudice, the defence is also that upon termination of employment the claimant was paid his terminal dues at ksh.38, 607 vide

cheque number 007792 and he acknowledged receipt. The claims made should be dismissed with costs.

Augustus Mutinda testified that he is the human resource manager of the respondent for the last 17 years and the claimant was an employee of the respondent. The claimant worked for the respondent until 3<sup>rd</sup> July, 2017 and went away where he remained absent without permission for 12 days. He tried calling the claimant wanting to know why he was absent and his reply was that he would explain himself upon return to work. That he should not exceed 3 days of absence without prior permissions but he remained absent until 17<sup>th</sup> July, 2017.

Mr Mutinda also testified that when the claimant returned he said he had lost a relative but there was no evidence. He said the father died but he failed to produce evidence in this regard. It was apparent the claimant was lying. The explanation that the manager allowed him to be away was without evidence as it was the practice to be directed to the human resource office to make application.

The claimant was cleared and paid his dues. This was done in accordance to the CBA and the union has not lodged any complaint.

The respondent filed work records.

At the close of the hearing both parties filed written submissions.

The claim is that by letter dated 14<sup>th</sup> July, 2017 the claimant was dismissed from his employment by the respondent on the grounds of desertion of duty which was not true as she had requested to be absent to attend to his ailing mother. That on the material day the human resource manager was absent. The defence is that the claimant left work at 5pm on 3<sup>rd</sup> July, 2017 and never returned. Upon being called to indicate why he was away he said he would explain upon return. He returned and said his father had died but failed to produce any evidence and his employment was terminated in accordance with the CBA which required summary dismissal upon being absent for over 3 years.

Section 44 of the Employment Act, 2007 (the Act) allow an employer to dismiss an employee for being absent from work without good cause and or permission of the employer. The only safeguard is that the employer must abide the provisions of section 41(2) of the Act requiring issuance of notice however short to allow the employee give his defences.

In the case of **National Bank of Kenya versus Samuel Nguru Mutonya Civil Appeal No.118 of 2017** the Court of Appeal held that;

*... where an employer fails to abide with the procedural requirements of section 41 of the Employment Act, even where pay in lieu of notice is paid immediately, such does not cure the procedural unfairness visited upon the claimant. I find the Respondent failed to meet the provisions of section 45 of the Employment Act. The Claimant is therefore entitled to the remedies sought.*

In **Standard Group Limited versus Jenny Luesby [2018] eKLR**, it was held that;

*... Section 44 of the Employment Act which was invoked covers 'Summary Dismissal' and in subsection (3) thereof allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. Subsection (4) then sets out various acts that may amount to gross misconduct so as to justify summary dismissal.*

In **Moi Teaching and Referral Hospital versus James Kipkonga Kendagor [2019] eKLR**, the court held that;

*... Nothing stops an employer from summarily dismissing an employee, except that section 44 requires an employer to demonstrate that the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service by doing or not doing series of things listed in that section and any other related things. But that is not all. Section 41 provides the procedure for notification and hearing before termination on grounds of misconduct. An employer must, before terminating the employment of an employee, for example for reasons of misconduct;*

***“...explain to the employee, in a language the employee 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.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations 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 claimant admitted he went away on 3<sup>rd</sup> July, 2017 after speaking with his supervisor, his operations manager and the director on his need to travel home and attend to his ailing mother. That the human resource manager was not in the office at the time. He however knew that to be away one required to make an application to such office and previously he had applied for annual leave and was allowed with approval to be away.

The respondent's officer Mr Mutinda also testified that when the claimant failed to attend work he called him on the phone and replied that he would only explain upon return and which he did after 12 days. Upon return, the claimant did not have any evidence that the mother was ailing or that his father had died as he alleged.

The claimant was thus allowed time to explain himself and his whereabouts to the human resource manager. His explanations were found to be lacking in truth. He could not prove that his father had died. There was no effort to address the reason for which he alleges to have been

allowed by the director to be away, that his mother was ailing.

Previously the claimant had applied for his annual leave. He was allowed time off. In this instance he was aware that to be away from work, he required to have written approval for such time away.

Summary dismissal was not until the 14<sup>th</sup> July, 2017 after the claimant had failed to give a plausible reason(s) for his absence from work for 12 days. His wage is paid up and until the 14<sup>th</sup> July, 2017. Had this been unfair termination of employment, employment should have terminated instantly and on 4<sup>th</sup> July, 2017 when there was no work attendance.

Accordingly, the court finds no case of unfairness in this case. The summary dismissal was justified in the circumstances of this case.

Compensation and notice pay is not due.

The claimant is seeking for the payment of terminal benefits of 6 years. the justification for such a claim is not set out. The respondent has relied on the CBA with the union but the claimant denounced the CBA on the basis that he had no union dues deduction to justify the application of the CBA on him even in a case where it was, Upon the summary dismissal, the payment of terminal benefits for 6 years is not given any foundation.

**Accordingly, the claims made are found without justification and are hereby dismissed. Costs to the respondent.**

**Delivered at Nakuru this 13<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....