



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1747 OF 2014**

**EVANS MUSYOKI MUTUA.....CLAIMANT**

**VERSUS**

**SHREEJI ENTERPRISES (K) LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 7<sup>th</sup> October 2014 stating that he was employed by the respondent from April 2013 as a Turn boy and worked until 11<sup>th</sup> August 2014 when he was served with a dismissal letter by the respondent's HR Manager and thereafter received only ksh. 7000 as his terminal dues. He therefore prayed for the following reliefs: -

- a. A declaration that his dismissal was unfair and unlawful.
- b. Ksh. 161,536.65 being terminal dues plus compensatory damages.
- c. Certificate of Service.
- d. Cost of this suit plus interest thereon.

2. The respondent filed defence on 18<sup>th</sup> December 2014 contending that she employed the claimant from 11<sup>th</sup> November 2013 until 11<sup>th</sup> August 2014 when she terminated his employment contract for his gross misconduct. She denied that the termination was unfair and averred that it was fairly done on account of a valid reason and after affording him an opportunity to defend himself. She further averred that after the separation, she paid the claimant all his dues and signed a Discharge Certificate dated 11.8.2014. She therefore denied that the claimant is entitled to the reliefs sought herein and prayed for the suit to be dismissed with costs.

3. The suit was heard on 17<sup>th</sup> and 28<sup>th</sup> October 2019 when both parties gave evidence and thereafter filed written submissions.

**Claimant's case**

4. The claimant testified as CW1. He stated that he joined the respondent in April 2013 as a Turn boy earning kshs 11,270 per month. He signed a written contract but the employer did not give him a copy. He was working from Monday to Saturday including public holidays and he also never went for any annual leave. He did his duties with due diligence despite the respondent's illegal actions.

5. He further stated that on 1<sup>st</sup> August 2014, he sought and obtained permission from his Supervisor to attend a funeral upcountry for 3 days and report back on 4<sup>th</sup> August 2014. After the 3 days' off he reported back to work on 4<sup>th</sup> August 2014 and continued with his duties as usual. However, on 11<sup>th</sup> August 2014 the HR Manager summoned him to the office and served him with a summary dismissal letter dated 9<sup>th</sup> August 2014 citing the reason as absence from work without permission. He requested for an explanation from the HR Manager but none was given. He then requested for his terminal dues and he was paid ksh. 7000 which was way below his rightful entitlement.

6. He contended that the reason for the dismissal was not valid and he was not accorded any fair hearing before the dismissal or paid any salary in lieu of notice. He further contended that the dismissal caused suffering to him and his family because he lost his source of livelihood. He therefore prayed for the reliefs sought herein.

7. On cross examination, he admitted that the contract of service he signed is dated 19<sup>th</sup> November 2013 and it indicated his Job Title as General Labourer and the contract period as from 1<sup>st</sup> November, 2013 to 31<sup>st</sup> October 2014. He reiterated that he attended funeral of a family member and while there he fell ill. He however could not remember the name of the deceased or produce any medical proof that he fell ill

and went to hospital. He admitted that his father was employed by the respondent and that he never attended the said funeral of the deceased family member. He admitted that he was absent from work from 1<sup>st</sup> to 4<sup>th</sup> August 2014, but contended that he sought permission verbally as always did and it was given verbally.

8. He further contended that he was never called to explain the absence. He denied that he was a habitual absentee despite being shown a copy of the attendance register for May to August 2014 and contended that he was never served with any warning letter. He admitted that he wrote the letter dated 9<sup>th</sup> September 2013 for the offence of attending work intoxicated. Finally, he denied ever signing the Discharge certificate dated 11<sup>th</sup> August 2014 and disowned the signature thereon.

#### **Defense case**

9. Mr. Barak Ochieng Odera, respondent's HR Manager, testified for the respondent as RW1. He stated the claimant was employed after being introduced to the respondent by his father, James Kamuti who works for the company. He further stated that the claimant signed a written contract of service dated 11<sup>th</sup> November 2013 which set out the terms of his engagement including summary dismissal for gross misconduct in accordance with section 44 of the Employment Act.

10. He further testified that the claimant absented himself from work for 4 days from 1<sup>st</sup> August 2014 and upon return on 5<sup>th</sup> August 2014, his Supervisor summoned him to provide reasons for his absentia, and he did so vide the letter dated 11<sup>th</sup> August 2014 stating that he fell ill after travelling to his home in the country side. The explanation was considered by the respondent and after consultation, and meeting with the HR department and the disciplinary committee, it was decided that the claimant did not give satisfactory reasons for his absentia or medical certificate to prove the alleged illness.

11. He contended that the dismissal was also decided in consideration of the claimant's record of misconduct including reporting to work while intoxicated or complete absence from work especially after the pay days. He contended that the said misconduct warranted summary dismissal of the claimant but due to the interventions by his father who was the driver for the Respondent's Managing Director, he was pardoned and served with severe and final warning. He contended that the reason for the dismissal was valid and the claimant was accorded a fair hearing. He further contended that the claimant did not follow the company procedure before absenting himself for the 4 days because he did not fill the required Form for approval by himself as the HR Manager. He contended that the claimant could not be reached over the phone even by his father during the 4 days of his absence.

12. Finally, he contended that after the dismissal the claimant was paid his terminal dues and signed a discharge Certificate confirming that he had been paid all his dues and that he had no other claim against the respondent. He therefore prayed for the suit to be dismissed with costs.

13. On cross examination, he reiterated that the claimant was habitual absentee and a drunkard who apologized every time. However, he admitted that he never served the claimant with any warning or produced his performance appraisal report as exhibit. He reiterated that the claimant absented himself without permission from 1<sup>st</sup> to 5<sup>th</sup> August 2014. He contended that the reason for the dismissal was absence from work and failure to communicate his absence. He further contended that before the dismissal he accorded the claimant a hearing and that is why he wrote the apology letter. However, he admitted that he did not have any minutes to prove that the alleged hearing took place.

14. As regard the reliefs sought, he contended that the claimant was paid for cash in lieu of his annual leave the same in August 2014. On the other hand, he denied the claim for salary in lieu of notice contending that the separation was through summary dismissal. He further contended that the dismissal was done 2 months before the expiry of the claimant's one- year contract. He maintained that the dismissal was justified because the claimant absented himself form work without leave or good cause and failed to notify the employer.

#### **Claimant's submission**

15. The claimant submitted that the reasons cited by the respondent for his dismissal was not true and contended that the burden of proof of a valid and fair reason for his dismissal rests with the respondent. He relied on **David Gichana Omuya v Mombasa Maize Millers Ltd [2014] e KLR** where Radido J held that section 43 of the Employment Act places a statutory obligation on the employer to prove the reasons for terminating the services of his employee, while section 45 of the Act requires the employer to prove that the reason (s) for terminating are valid and fair. According to him the respondent did not prove the reasons cited in the termination letter, namely absenteeism and underperformance.

16. In addition, he submitted that the procedure followed before his dismissal was not fair as it did not accord with section 41 of the Employment Act because he was not given a fair hearing. He contended that Rw1 did not produce any minutes of the alleged disciplinary hearing. He relied on **Shankar Sanlani v DHL Global forwarding (K) Limited [2012] e KLR** where Ongaya J upheld the doctrine of fair hearing before dismissing an employee for misconduct.

17. The claimant urged the court to find that the termination in the stated case was also unfair and proceeded to award him the reliefs set out in the claim.

#### **Respondent's submissions.**

18. The respondent submitted that the reason for the dismissal was valid because the claimant absented himself from work for days without leave or notice to her that he was sick. She further submitted that the claimant was given a hearing after which he wrote an apology letter dated 11<sup>th</sup> August 2014. For emphasis she relied on **Banking, insurance & Finance Union (Kenya) v Baclays Bank of Kenya Ltd [2014] e KLR** where Mbaru J held that failure by the employee to bring to the attention of the employer that absence from work is due to illness amounts to absconding and the employee is deemed to have abandoned his contract of employment.

19. As regards the reliefs sought, she contended that the claimant is not entitled to salary in lieu of notice and compensation because his summary dismissal was fairly done under section 44 of the Employment Act. In addition, she denied the claim annual leave contending that the claimant did not complete one year service to qualify for the 21 days leave. Finally, she denied the claim for unpaid salary contending that the claimant signed Discharge certificate acknowledging payment of all his dues and confirming that he had no other claim against her.

### **Issues for determination**

20. There is no dispute that the claimant was employed and later dismissed by the respondent on 11<sup>th</sup> August 2014. The issues for determination herein are: -

- a. Whether the dismissal was grounded on a valid and fair reason.
- b. Whether a fair procedure was followed.
- c. Whether he is entitled to the reliefs sought.

### **Reason for the termination**

21. The dismissal letter dated 9<sup>th</sup> August 2014 cited the reason for the dismissal as absence from work without permission and failure to communicate the matter with the office. The letter stated as follows:

**“RE: ABSENCE WITHOUT PERMISSION- GROSS MISCONDUCT; DISMISSAL**

**Reference is made to our Query regarding your absence from your place of work from 01/08/2014 to 5<sup>th</sup> August, 2014 consecutively.**

**We are concerned that you have not provided any reason to justify your absence for the entire duration. It also of concern that you did not make any effort to communicate with the office on the matter.**

**We have carefully appraised your performance and general conduct at your place of work, we regret to advise you that it leaves a lot to be desired....”**

22. Under section 43 and 45 of the Employment Act, the employer has the burden of proving that the reason for the termination of his employee’s services was valid and fair. In this case the respondent produced attendance register to prove that the claimant absented himself from work from 1<sup>st</sup> to 4<sup>th</sup> August 2014. Rw1 contended that the absence was without permission or good cause and the claimant did not communicate to the office that he was sick or present any Medical certificate to prove that he was incapacitated. She further contended that the claimant did not fill the required Forms for his absence to be approved by the Rw1.

23. The claimant admitted that he indeed absented himself from work on the said dates but contended that he obtained permission form his Supervisor to attend funeral of a family member and while there he fell hill. He however did not produce any evidence to prove that he was permitted by his Supervisor to be away on the said days nor did he produce any medical evidence to prove that he was indeed sick and incapacitated. He also did not rebut the evidence by the respondent that he did not communicate with the office that he was ill.

24. After careful consideration of the evidence and the submissions presented by both parties, I am satisfied that the respondent has discharged his burden of proving that she had a valid and fair reason for dismissing the claimant as required by section 43 and 45 of the Employment Act. Under section 44(4) (a) of the Act, absence from work without leave or good cause entitles the employer to summarily dismiss the employee. Likewise, jurisprudence emerging from the court is that failure by a sick employee to communicate to the employer the reason for his absence amounts to absconding. In **Banking, insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] e KLR** where Mbaru J held that:

**“the aspect of being ill is not a wrong in itself. What is wrong is not bringing the same to the attention of the employer and further being away from work without authorization or sharing information as to where the employee was. This amounts to absconding duty and a serious labour sanction follows as this is tantamount to negation of a contract of employment. An employee is taken to have abandoned his contract of service without notice to the employer.”**

### **The Procedure followed**

25. The claimant contended that he was never summoned for any disciplinary hearing and as such the termination of his service was done without according him any chance to defend himself. However, the respondent maintained that she accorded the claimant hearing before the separation. RW1 contended that the claimant was invited to hearing after which he wrote an apology letter. However, Rw1 did not produce any copy of the minutes of the alleged disciplinary hearing and did not prove that section 41 of the employment Act was complied with, that is, explaining the offence to the claimant in the presence of another employee and thereafter accorded the two a chance to air their representations.

26. The apology letter dated 11<sup>th</sup> August 2014, was written by the claimant after the dismissal and it does not refer to any disciplinary hearing. It follows therefore that before writing the dismissal letter dated 9<sup>th</sup> August 2014, the respondent had not accorded the claimant any hearing and as such she has failed to prove that a fair procedure was followed before the dismissing the claimant.

## Reliefs

27. In view of the finding that the dismissal of the claimant for gross misconduct was done without following a fair procedure I make declaration that the dismissal was unfair and unlawful as prayed.

28. Under section 49(1) of the employment Act, I award the claimant one month salary in lieu of notice plus one months' salary compensation for unfair termination. In awarding the said compensation, I have considered the short period of service by the claimant and also the fact that he contributed to the termination through misconduct.

29. The respondent opposed any award of damages contending that the claimant signed the Discharge Certificate dated 11<sup>th</sup> August 2014. The claimant denied signing the said certificate and disowned the signature thereon. I have carefully considered the certificate and noted that it was signed by thumb print by Dr S. Deya and a worker without name. The respondent did not make any effort towards proving that the thumb print was put there on by the claimant and on his own volition. Rwl who produced it did not sign or witness the same nor has any director or officer of the respondent signed it. I therefore find that the certificate is not a binding contract between the claimant and the respondent and it cannot be enforced by the respondent to deny the claimant the reliefs sought herein. It does not also indicate the amount of money that was offered and accepted by the claimant as consideration for the Discharge and settlement.

30. The claim for accrued leave is also granted. The respondent admitted that the claimant started working for her on 6<sup>th</sup> June 2013 and she dismissed him on 11<sup>th</sup> August 2014. The total duration of service was over 12 consecutive months and under section 28 of the Employment Act, he earned 21 leave days which I hereby grant as prayed.

31. However, the claim for balance of salary for August 2014 is dismissed for want of particulars and supporting evidence.

32. Finally, the prayer for certificate of service was not opposed and I therefore grant it by section 51 of the Employment Act.

## Conclusion and disposition

33. I have found that the termination of the claimant's services was done without following a fair procedure and as such it was unfair within the meaning of section 45 of the Employment Act. I have further found that he is entitled to some of the relief sought. Consequently, I enter judgment for the claimant as follows:

**a. Notice**                      **Kshs. 11,270**

**b. Compensation**        **Kshs. 11,270**

**c. Leave**                        **Kshs. 9,102.70**

**Total**                      **Kshs. 31,642.70**

The said amount is subject to statutory deductions, but in addition to costs and interest at court rates from the date hereof.

**Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.**

**ONESMUS N. MAKAU**

**JUDGE**