



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

**CAUSE NO. 987 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**GMK.....CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....RESPONDENT**

**JUDGMENT**

Vide his statement of claim dated 2<sup>nd</sup> June, 2015 and filed in Court on 9<sup>th</sup> June, 2015, the claimant avers that his employment was unfairly and unlawfully terminated by the Respondent.

His case is that he was employed by the Respondent, a Hospital on or about 8<sup>th</sup> October, 1999 in the capacity of Medical Social Worker II and posted to the medical wards. He was later transferred from the Medical Ward 7A to VCT KNH on or about May 2012. The Claimant averred he was earning a monthly salary of Kshs.69,102/- exclusive of other allowances.

The Claimant maintained that during the subsistence of his employment with the Respondent, he performed his duties diligently and to the Respondent's satisfaction.

He further averred that before he could take up his new role he became sick suffering from severe mental depression and was treated for a period of one year at the Respondent Hospital by Dr. Pius Kigamwa.

He further averred that due to his illness he was unable to report to his new work station until 26<sup>th</sup> July, 2012 when he was served with a termination letter by the Respondent.

The Claimant stated that his termination was effected maliciously and without due regard to his welfare and rights. In his Memorandum of Claim the Claimant seeks the following reliefs:

- a) Reinstatement to his previous position/job without any loss of benefits.
- b) Salary arrears for the entire period the Claimant has been out of employment.
- c) Damages for wrongful and/or unlawful termination
- d) In the alternative, payment of all the lawful dues comprising of the following:

i.. Pay in lieu of notice.....	Kshs.69,102
ii. Pay in lieu of leave days earned.....	Kshs.69,102
iii. Salary for July 2012.....	Kshs.69,102
iv. Medical expenses.....	Kshs.12,000
v. Dependants medical expenses.....	<u>Kshs. 19,438</u>
<b>Total</b>	<b>Kshs.238,744</b>

e) Maximum 12 months' compensation for wrongful termination.

f) Costs of this suit with interest thereon.

The Respondent in its Memorandum of Response dated and filed in Court on 21<sup>st</sup> September, 2015 admits having engaged the Claimant from 3<sup>rd</sup> March, 2010. It however denied having terminated the employment of the Claimant as alleged and contended that the Claimant absconded duty and failed to notify it of his whereabouts and/or reasons for absconding duties for over two months prompting it to issue him with a show cause letter which was not responded to.

The Respondent maintains that the Claimant was afforded a chance to be heard but ignored. It is on this basis that the Respondent contended that the instant Claim lacks merit and therefore urged this Court to dismiss the same in its entirety.

### **Evidence**

The case was heard on 9<sup>th</sup> August, 2019. The Claimant testified on his own behalf and the Respondent called on witness to testify on its behalf. Parties thereafter filed and exchanged written submissions to the Claim.

### **Claimant's Case**

The claimant adopted his witness statement dated 14<sup>th</sup> February

2019 and filed in Court on 15<sup>th</sup> February 2015 as his evidence in chief. He testified that he was terminated without any prior notice.

The claimant testified that he was never called to a disciplinary hearing prior to his termination and that he did not receive the notice to show cause and the letter for absconding duties as the communication was sent to Meru despite the fact that the Respondent was aware where he resided.

Upon cross examination the claimant confirmed having received a letter of transfer from the Medical Ward 7A to VCT. He further confirmed that he did not report to his new work station as he suffered an episode of shock and was hospitalized. He stated that a medical report on his condition was prepared. He stated that the Respondent failed to consider the medical report from Dr. Kigamwa prior to his dismissal.

The claimant stated that the medical report prepared by Dr. Kigamwa was not availed to this Court. He confirmed having previous disciplinary issues prior to his termination.

On re-examination the claimant stated that the previous disciplinary issues were not raised in the respondent's defence and that they are not related to the instant claim.

He stated that he was not paid his salary up to the date of his termination. He further stated that the

Respondent never referred him for any review on his medical condition.

The Claimant urged the Court to allow his Claim as prayed.

### **Respondent's Case**

RW1, WALTER OWINO GONY, Human Resource Officer of the Respondent adopted his witness statement filed in Court on 19<sup>th</sup> October 2018 as his evidence in chief. RW1 testified that the Claimant absconded duty from 3<sup>rd</sup> May, 2012 and as a result his salary was stopped.

RW1 testified that the Claimant was subsequently sent a show cause letter Ref. KNH/533109/A dated 20<sup>th</sup> June, 2012 to his last known address and was accorded a period of 14 days to respond to the same. That the Claimant did not respond to the show cause letter until 14<sup>th</sup> January, 2014 when he delivered a letter to the Respondent responding to his dismissal letter dated 26<sup>th</sup> July, 2012.

RW1 further stated that the Claimant's services with the Respondent were terminated on account of desertion of duty with effect from 3<sup>rd</sup> May, 2012 as per the dismissal letter dated 26<sup>th</sup> July, 2012.

RW1 stated that the Claimant was duly notified of his right to appeal which he did exercise but the same was dismissed on account of being time barred. He maintained that the Respondent therefore had cause to terminate the Claimant's services on account of desertion.

RW1 testified that the medical report by Dr. Pius Kigamwa that the Claimant seeks to rely on was prepared on 20<sup>th</sup> November 2012 five (5) months after the show cause letter had been sent and termination taken place. That there was no communication either verbal or written on the reason for the Claimant absconding his duties. RW1 urged this Court to dismiss the Claim in its entirety.

Upon cross examination RW1 stated that the Claimant's last known address as per the Respondent's record was P. O. Box 35358 Nairobi and that there was no change in address. That the letters were all sent by registered mail although the same were not marked as such.

On further cross examination RW1 stated that the communication from the doctor indicated that the Claimant was suffering from depression.

He testified that following his desertion from duty the Claimant was not available for disciplinary hearing. He further testified that the Claimant is entitled to payment of dues up to and including 26<sup>th</sup> July 2012.

RW1 stated that the Respondent was forced to replace the Claimant following his desertion as it offers essential services. He further stated that due process was followed and therefore the Claimant has no claim as against the Respondent herein. He insisted that the Claimant is not entitled to any of the reliefs sought in his Statement of Claim.

On re-examination RW1 reiterated that the Claimant's dismissal was on account of desertion. Further, that as per the Respondent's record the Claimant had more than one postal address. He testified that the Claimant was not available for the Respondent to subject him to a medical examination at the staff clinic.

RW1 testified that the Respondent did not respond to the Claimant's Appeal as the same was time barred.

### **Submissions by the Parties**

The Claimant submitted that his termination on account of alleged desertion by the Respondent was unfair and wrongful as the Respondent failed to show any steps taken to notify him of the dismissal and sending the letters to a different address not held by him. The Claimant relied on the case of **Godfrey Anjere v Unique Suppliers Limited (2015) eKLR** where the Court opined that where an employer seeks

to dismiss an employee on account of absconding or desertion of duties, the employer is required to show steps it took to inform the employee that dismissal would result if they did not report to work.

The Claimant maintained that his absence from duty was well explained as he was taken ill with serious mental depression and therefore did not abscond and/or desert duty as alleged by the Respondent.

The Claimant further submitted that his termination in the circumstances was unfair, unlawful and wrongful as it did not follow the mandatory provisions of Section 41 and 43 of the Employment Act, 2007.

It is on this basis that the Claimant maintained that he is entitled to the reliefs sought in his Claim and therefore urged the Court to allow the same as prayed. The Claimant relied on the cases of **Aggrey Lukorito Wasike v Kenya Power & Lighting Company Limited (2016) eKLR**, **Jadiah Mwarania v Kenya Reinsurance Corporation Limited (2018) eKLR**, **Mary Chemweno v Kenya Pipeline Company Limited (2014) eKLR** and **Kenny Kinako v Rigler Kenya (2016) eKLR** in which cases the Courts found the Claimants termination unfair and allowed their respective claims to include claims for reinstatement and maximum compensation for unfair termination.

### **Respondent's Submissions**

The Respondent on the other hand submitted it had a valid reason for the Claimant's termination as provided under Section 44(4)(a) of the Employment Act, 2007. It contended that the Claimant is guilty of absconding lawful duty after being redeployed from Wards 7A and 7B to VCT.

The Respondent submitted that the Claimant had a duty to inform it of his challenges which was not done. The Respondent relied the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Limited (2014) eKLR**.

The Respondent further submitted that it followed due process as set out under the provisions of Section 41 and 45 of the Employment Act, 2007 therefore maintaining that the termination was lawful and fair.

The Respondent submitted that the Claimant is not entitled to the relief of reinstatement as it has been a period of more than three (3) years since the Claimant's termination and further that it has already filled the position.

The Respondent further submitted that the Claimant is not entitled to payment of salary arrears for the period he was out of employment as he is the author of his own misfortunes having failed to notify the Respondent of his whereabouts.

The Respondent further submitted that the Claim for unlawful termination does not lie as the Claimant's termination was lawful. In conclusion the Respondent maintained that the entire Claim fails as the Claimant's termination was procedurally and substantively justified.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto. The following are the issues for determination:

1. Whether the Claimant was unlawfully terminated or he deserted duty;
2. Whether the Claimant is entitled to the remedies sought.

### **Unfair termination**

The reason for the dismissal of the claimant according to the letter of dismissal is desertion. **Black's Law Dictionary (Ninth Edition)** defines desertion as:

## **The willful and unjustified abandonment of a person's duties or obligations.**

In the South African case of **Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)** the Court sought to distinguish desertion from unauthorized absence from duty as follows:

*"...desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post, subsequently formulates the intention not to return."*

The claimant testified that when he was transferred from Ward 7A to VCT he did not report to VCT. He testified that he got depressed and was treated by Dr. Kigamwa.

The claimant's letter of dismissal is reproduced below –

Ref: KNH/xxxxxxxxxx

Date: 26<sup>th</sup> July 2011

Mr. GMK

P.O. Box 27

GITHONGO, MERU

Dear Sir,

### RE: DISMISSAL FROM THE SERVICE

*Further to this office letter Ref. No.KNH/XXXXXXX/ dated 20<sup>th</sup> June 2012, the Hospital Management has established that you have not been on duty since 3<sup>rd</sup> May 2012 and you have not communicated to the Management the cause of your continued unauthorized absence from duty thus your whereabouts remain unknown to date. Absence from duty without permission and/or any reasonable cause is a serious breach of discipline that cannot be condoned in the service.*

*In view of the above, and considering the seriousness of the offence, it has been decided that you should be and are hereby dismissed from the service with effect from 3<sup>rd</sup> May 2012 on account of desertion in line with Section XV Part VIII B Clause 3(a) of the Terms and Conditions of Service. On dismissal, and upon request, you have the option to be paid an actuarially determined fraction of your withdrawal benefits in line with the pension rules. You are however, required to indicate how you will offset any Hospital liabilities that may be outstanding and/or established.*

*You are required, to return the attached Clearance Certificate duly completed and signed by the relevant Hospital authorities. Also, sign the attached Official Secrets Act Declaration form for officers leaving the service in the presence of a witness and the Declaration of Income, Assets and Liabilities and return the same to this office for record purposes.*

*You have the option to appeal against this decision through this office to the Chairman, KNH HR Committee of the Board within a period of twenty one [21] days from the date hereof.*

*Yours faithfully,*

SIGNED

J.K. Qng'ayo (Mrs)

FOR: CHIEF EXECUTIVE OFFICER

Cc. Head

Medical Social Work Department

KNH

The Chief Shop steward

KUDHEIHA Works Committee

KNH”

The letter clearly explains that the claimant’s whereabouts was unknown.

Section 44(4)(a) provides that

**(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—**

**(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;**

Further Section 30(2) provides that –

**(1) 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.**

In the case of **Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR** it was held: -

*“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”*

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in Section 47(5) of the Employment Act. The Section provides that –

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

An employee has the burden of proving that an unfair termination of employment has occurred while the employer’s burden is to justify the reasons for such termination.

In his evidence the claimant gave the reason why his termination was unfair to be because he was not given notice and because the respondent did not consider Dr. Kigamwa’s medical report. The medical condition of the claimant was brought to the respondent’s attention well after the termination. This is therefore not a valid reason. A medical report is not an excuse for absconding duty or justification of the same. What the claimant needed to produce as authority for the absence was a sick off as set out in Section 39(2). The notice to show cause was sufficient notification of intention to dismiss the claimant if

he did not show cause. The show cause letter is reproduced below –

*REF: KNH/XXXXXXX*

*Date: June 20, 2012*

*GMK*

*P.O. Box 27*

*Githongo, MERU*

*Dear Sir,*

**RE: ABSCONDMENT FROM DUTY**

*It has come to the attention the Hospital Management that you*

*were vide letter Ref No. KNH/XXXXXXXXX dated 2/5/2012 redeployed from Wards 7A and 7B to VCT. To date you have not reported as required despite being released from your previous station. Your whereabouts remain unknown. You are reminded that failure to comply, execute any valid instruction given by an authorized officer, and abscondment of duty constitutes gross misconduct which may lead to summary dismissal.*

*In view of the above, and considering the seriousness of the offense severe disciplinary action is being contemplated against you. However, before this is done you are hereby called upon to show cause why the intended disciplinary action should not be taken against you. Your representations if any should reach this office within fourteen (14) days from the date hereof.*

*SIGNED*

*P. K. Kimani*

*FOR: CHIEF EXECUTIVE OFFICER*

*CC. SAD, HR & Admin,*

*Chief Shop Steward, KUDHEIHA”*

The letter clearly warns the claimant that if he failed to show cause his services would be terminated. An employee who absconds duty, and who does not respond to a show cause letter, cannot complain about being heard because such an employee is unavailable to be heard.

From the foregoing, I find that there was valid reason for taking disciplinary action against the claimant. Further having failed to respond to the show cause letter and his whereabouts being unknown, the respondent was justified in summarily dismissing the claimant.

I therefore find that the dismissal was fair both procedurally and substantively and uphold the same.

Having found the dismissal fair and valid, the claim has no merit and is accordingly dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**MAUREEN ONYANGO**

**JUDGE**